



The Law Commission

Working Paper No 58

Breach of Confidence



LONDON

HER MAJESTY'S STATIONERY OFFICE

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It does not represent the final views of the Law Commission.

The Law Commission would be grateful for comments on this Working Paper before 30 April 1975.

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THE LAW COMMISSION

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BREACH OF CONFIDENCE

PART I

GENERAL INTRODUCTION

1. In July 1972 the Report of the Committee on Privacy (the Younger Committee)¹ was published. The Committee in paragraph 630 of their Report concluded that the action for breach of confidence afforded, or at least was potentially capable of affording, much greater protection of privacy than was generally realised, but that it would not be satisfactory simply to leave this branch of the law, with its many uncertainties, to await further development and clarification by the courts. They therefore recommended that the law relating to breach of confidence be referred to the Law Commission and to the Scottish Law Commission with a view to its clarification and statement in legislative form².

2. In paragraph 632 of their Report the Younger Committee recommended that it should be a civil wrong, actionable at the suit of any person who has suffered damage thereby, to disclose or otherwise use information which the discloser knows, or in all the circumstances ought to have known, was obtained by illegal means. They envisaged that the kinds of remedy available for this civil wrong would be similar to those appropriate to an action for breach of confidence. In paragraph 633 the Committee expressed the hope that, if the Law Commissions were

1. 1972 Cmnd. 5012.

2. The broad aims of such a statement, which the Committee thought would be generally accepted, were set out in para. 631 of their Report. For ease of reference, the whole chapter of the Committee's Report in which this paragraph appears is set out as an Appendix to this Working Paper.

entrusted with the task of clarifying and stating in legislative form the law relating to breach of confidence, they would also take into account, and coordinate their work with, the recommendation made in paragraph 632.

3. On 16 March 1973 the then Lord Chancellor, the Rt. Hon. Lord Hailsham of St. Marylebone, gave us a reference under section 3(1)(e) of the Law Commissions Act 1965 in the following terms:

- "(a) to consider the law of England and Wales relating to the disclosure or use of information in breach of confidence and to advise what statutory provisions, if any, are required to clarify or improve it; and
- (b) to consider and advise what remedies, if any, should be provided in the law of England and Wales for persons who have suffered loss or damage in consequence of the disclosure or use of information unlawfully obtained and in what circumstances such remedies should be available."

The Scottish Law Commission was given a reference by the Lord Advocate in the following terms:

"With a view to the protection of privacy -

- (1) to consider the law of Scotland relating to breach of confidence and to advise what statutory provisions, if any, are required to clarify or improve it;
- (2) to consider and advise what remedies, if any, should be provided in the law of Scotland for persons who have suffered loss or damage in consequence of the disclosure or use of information unlawfully obtained, and in what circumstances such remedies should be available."

4. Pursuant to our reference we have prepared this Working Paper on which we would welcome comment and criticism. The Paper is summarised in paragraph 147 below, but we would emphasise the tentative character of the conclusions there reached. It has not proved easy even to state the present law with any certainty,

and in those areas in which the courts have been fairly active the issues have in general concerned the specialised field of commercial and industrial secrets rather than the disclosure of embarrassing details of an individual's private life. One of our principal difficulties has in fact been to formulate principles governing breach of confidence which are sufficiently precise and at the same time sufficiently flexible adequately to cover very different situations of fact: on the one hand, for example, the publication in a newspaper or in a book of information obtained in confidence about an individual's private affairs, and on the other hand, the exploitation by an industrial undertaking of an invention, the details of which have been confidentially disclosed to the undertaking by the inventor in the course of abortive negotiations for the sale of the invention. We have also found it very difficult to strike an acceptable balance between two conflicting aims of public policy: on the one hand, the aim of protecting information given in confidence or obtained by unlawful means, and on the other hand, the principle that there should be no unnecessary restrictions on the free circulation of true information.

5. We gratefully acknowledge the most helpful advice in the preparation of this Paper which we have received from Mr. J. F. Mummery, of counsel, and Mr. P.M. North, Fellow of Keble College, Oxford.

PART II

THE EXISTING LAW

INTRODUCTION

6. The action for breach of confidence is not founded on any statute and the law relating to it has developed entirely as a result of successive judicial decisions. Broadly, it may be described as a civil remedy affording protection against the unauthorised disclosure or use of information which is of a confidential nature and which has been entrusted to a person in

circumstances which impose an obligation to respect its confidentiality.

7. The origin of the jurisdiction is obscure. But the two basic cases usually cited to support the jurisdiction are Prince Albert v. Strange³ and Morison v. Moat⁴. In Prince Albert copies of some privately printed etchings made by Queen Victoria and the Prince Consort had come by a breach of confidence (probably on the part of the printer) into the hands of the defendant who proceeded to publish a catalogue describing them and attributing them to the plaintiff and his wife. An injunction was granted restraining the defendant from publishing without consent either the etchings or the catalogue. The important aspects of the decision were, first, that the court afforded protection (by the injunction in respect of the catalogue) to a confidential piece of information and not merely to the form in which it was expressed, and secondly, that the protection was given against a defendant who had not been a party to the original breach of confidence. In Morison v. Moat an unpatented secret recipe for the compounding of a medicine was communicated by Moat Senior to his son in breach of an express obligation to his partner and following the death of Moat Senior an injunction was granted restraining the son from making any use of the secret recipe. This case is particularly noticeable for the discussion in the judgment⁵ of the different grounds which had been assigned for the exercise of the jurisdiction:

"In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence, meaning, as I conceive, that the Court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given the obligation of performing

3. (1849) 1 H. & Tw. 1; 1 Mac. & G. 25.

4. (1851) 9 Hare 241.

5. Ibid., 255.

a promise on the faith of which the benefit has been conferred; but, upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it."

8. The modern development of the jurisdiction starts in 1948 with Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.⁶. For some years prior to that decision, the courts had tended to decide cases involving a breach of confidence - particularly master and servant cases - on the basis that there had been a breach of an implied term in a contract and in Vokes Ltd. v. Heather⁷ Lord Greene M.R. went out of his way to deplore the introduction of equitable principles into relationships where a contract existed. But in Saltman⁸ he held that "the obligation to respect confidence is not limited to cases where the parties are in contractual relationship" and he went on to state the general principle as being:

"If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied, of the plaintiff, he will be guilty of an infringement of the plaintiff's rights."

In this case the Saltman Engineering Co. Ltd. (the first plaintiffs) had conceived the idea of manufacturing certain leather punches. Under agreement with them, the second plaintiffs prepared drawings for the manufacture of dies from which these punches could be made. The second plaintiffs then placed an order for the manufacture of the dies with the third plaintiffs who, however, took the drawings to the defendants and asked them to make the dies. The defendants thereafter used the confidential drawings to manufacture leather punches on their own account. No contractual relationship was found to exist between the first plaintiffs and the defendants, but an inquiry into the

6. (1948) 65 R.P.C. 203; [1963] 3 All E.R. 413.

7. (1945) 62 R.P.C. 135, 141-2.

8. (1948) 65 R.P.C. 203, 211, 213; [1963] 3 All E.R. 413, 414.

damages suffered by the first plaintiffs was nevertheless ordered, the court holding that the defendants knew that the confidential drawings had been placed in their hands for a strictly limited purpose and that they were accordingly bound by an obligation of confidence.

9. Saltman's case is also important because of the consideration given to the question of the confidentiality of the information itself. The judgment recognised that a necessary element of the action for breach of confidence is that the information itself must have the necessary quality of confidence about it, that is to say, "it must not be something which is public property and public knowledge". But after stating this general principle, Lord Greene M.R. went on to point out that it was perfectly possible to have a confidential document which was the result of work done by the maker on materials available to anybody; although the materials were public property the work done on them was not. On the facts of this particular case, it was true that the defendants could have obtained the necessary information by purchasing one of the first plaintiffs' leather punches and taking it to an expert draughtsman for the necessary drawings to be prepared; but they had not done this and instead had relied on the information (which was still confidential as far as they were concerned) contained in the drawings entrusted to them.

10. The significance of the decision in Saltman was not immediately recognised, but in recent years the principles it enunciated have been increasingly applied in cases concerned with the unauthorised use or disclosure of industrial information or trade secrets. In some of these cases (as where the defendant was formerly an employee of the plaintiff or a firm collaborating with the plaintiff in the marketing of a product) a contractual relationship can be found⁹; while in others (as

9. See e.g. Cranleigh Precision Engineering Ltd. v. Bryant [1966] R.P.C. 81; [1965] 1 W.L.R. 1293; Peter Pan Manufacturing Corporation v. Corsets Silhouette Ltd. [1963] R.P.C. 45; [1964] 1 W.L.R. 96.

where the defendant was merely negotiating with the plaintiff with a view to collaborating in the marketing of a product) no contractual relationship may ever have been formed¹⁰. By resorting to the law of breach of confidence, the courts have been enabled to disregard the distinction between these classes of case based on the existence of a contractual relationship and concentrate instead on the issue of whether information imparted for the purpose of benefiting both parties has been wrongfully used by one of the parties for another purpose detrimental to the plaintiff. In Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd.¹¹ Lord Evershed M.R. summed up the position in relation to the exchange of information in confidence between traders when he said:

"It may broadly be stated, as a result of the decision of this Court in Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd. (1948) 65 R.P.C. p. 203 that if information be given by one trader to another in circumstances which make that information confidential, then the second trader is disentitled to make use of the confidential information for purposes of trade by way of competition with the first trader."

11. Terrapin's case is, however, better known for a dictum in the judgment given at first instance by Roxburgh J. which can be seen in retrospect as the beginning of what has come to be called "the springboard doctrine". He said¹²:

"As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person

10. See e.g. Seager v. Copydex Ltd. [1967] R.P.C. 349; [1967] 1 W.L.R. 923.

11. [1960] R.P.C. 128, 131.

12. The passage is reported in [1960] R.P.C. 128, 130 as a footnote to the report of the judgment of the Court of Appeal. For a fuller report of the passage see Cranleigh Precision Engineering Ltd. v. Bryant [1966] R.P.C. 81, 96; [1965] 1 W.L.R. 1293, 1317-8.

who made the confidential communication, and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public ... It is, in my view, inherent in the principle upon which the Saltman case rests that the possessor of such information must be placed under a special disability in the field of competition to ensure that he does not get an unfair start."

In Terrapin the defendant had formerly been associated with the plaintiff in the construction and marketing of portable building units of a particular type and it was held that the technical information imparted to him regarding the construction of these units retained its quality of confidence; even though the plaintiff had published a brochure giving certain details, the defendant still had a long start over any member of the public who attempted to construct the units with no knowledge beyond that contained in the brochure.

12. Roxburgh J.'s dictum in Terrapin was approved in Cranleigh Precision Engineering Ltd. v. Bryant¹³ where it had been argued that the dictum was inconsistent with the decision of the House of Lords in O. Mustad & Son v. Dosen¹⁴. In both these cases information which was alleged to be confidential had been incorporated in a patent and in Mustad it was held that this deprived it of its confidential nature and made it common knowledge. But whereas in Mustad the publication of the patent had been made by the plaintiff, in Cranleigh the existence of the patent of a third party had come to the notice of the defendant in the course of his employment by the plaintiff and he had failed in his duty to inform his employer of the existence of the patent; moreover, it was held in Cranleigh that even if the details in the patent specification ceased to be confidential when that specification was published, there was continuing confidentiality in the knowledge which the defendant had of the significance of the patent specification in relation to the plaintiff's product and his business.

13. [1966] R.P.C. 81; [1965] 1 W.L.R. 1293.

14. The decision was given in 1928 but first reported in 1963. See [1963] R.P.C. 41; [1964] 1 W.L.R. 109.

13. The principles enunciated in Saltman were further developed in two significant respects in Seager v. Copydex Ltd.¹⁵, where the defendants were held liable for using information regarding a particular type of carpet grip imparted in confidence by the plaintiff. In the first place, the defendants were held liable even though it was accepted that they had acted bona fide and their use of the plaintiff's idea was entirely unconscious. In the second place, it was held that this was not a case for an injunction but only for damages and the judgment indicates that the reason for this is that, at least in some cases, the duty of a recipient of confidential information is not to abstain from using the information but merely to abstain from using it without paying for it.

14. The application of the law of breach of confidence is not confined to cases involving industrial information and two recent cases involving information of a general nature are of particular interest: Duchess of Argyll v. Duke of Argyll¹⁶ and Fraser v. Evans¹⁷. In Argyll, the Duchess of Argyll obtained an injunction restraining her former husband and a newspaper from disclosing publicly marital confidences entrusted to the Duke by the Duchess during their marriage. It was held that since marriage was of its very essence a relationship of a confidential nature it gave rise to an obligation of confidence and that this obligation was not destroyed by the subsequent dissolution of the marriage. But the court recognised that there were practical difficulties in deciding what communications between husband and wife should be protected and on this point Ungood-Thomas J. said¹⁸:

"If this were a well-developed jurisdiction doubtless there would be guides and tests to aid in exercising it. But if there are communications which should be protected and which the policy of the law recognises should be protected ...then the court is not to be deterred merely

15. [1967] R.P.C. 349; [1967] 1 W.L.R. 923.

16. [1967] Ch. 302.

17. [1969] 1 Q.B. 349.

18. [1967] Ch. 302, 330.

because it is not already provided with fully developed principles, guides, tests, definitions and the full armament for judicial decision. It is sufficient that the court recognises that the communications are confidential, and their publication within the mischief which the law as its policy seeks to avoid, without further defining the scope and limits of the jurisdiction; and I have no hesitation in this case in concluding that publication of some of the passages complained of is in breach of marital confidence."

15. In Fraser the plaintiff, who was a public relations consultant under an obligation of confidentiality to the Greek Government, made a report to that Government which, from sources in Greece, ultimately came into the hands of a newspaper in Britain. The plaintiff's application for an injunction was refused because it appeared that although he was under an obligation of confidence, there was no reciprocal obligation binding the Greek Government, who were free in point of law to disclose the document to whomever they pleased. Lord Denning M.R. said¹⁹:

"No person is permitted to divulge to the world information which he has received in confidence, unless he has just cause or excuse for doing so. Even if he comes by it innocently, nevertheless once he gets to know that it was originally given in confidence, he can be restrained from breaking that confidence. But the party complaining must be the person who is entitled to the confidence and to have it respected. He must be a person to whom the duty of good faith is owed."

THE BASIS OF THE JURISDICTION

16. One of the most unsatisfactory aspects of the law of breach of confidence and one which has perhaps been responsible as much as anything for inhibiting its development, is the uncertainty which has persisted regarding the basis on which the

19. [1969] 1 Q.B. 349, 361.

jurisdiction is exercised. As one commentator²⁰ has written:

"A cursory study of the cases, where the plaintiff's confidence has been breached, reveals great conceptual confusion. Property, contract, bailment, trust, fiduciary relationship, good faith, unjust enrichment, have all been claimed, at one time or another, as the basis of judicial intervention. Indeed, some judges have indiscriminately intermingled all these concepts."

Neither the protection of property rights nor the enforcement of implied terms in a contract are adequate on their own to explain the jurisdiction: the former because it allows no account to be taken of the circumstances in which confidential information is disclosed, the latter because it is limited to persons in a contractual relationship. In recent years, therefore, the courts have been led to the view that "the jurisdiction is based not so much on property or on contract as on the duty to be of good faith"²¹ and the law has been said to depend on "the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it"²². The cases show, however, that the courts do not confine themselves to purely equitable principles in solving the problems which arise in breach of confidence cases and it would seem more realistic to regard the modern action simply as being sui generis.

THE ESSENTIAL ELEMENTS OF THE LAW

17. Because the present law has been developed from a number of different sources, it is not an easy task to isolate the general principles which govern an action for breach of confidence. Many of the leading cases contain dicta of great

-
20. Gareth Jones, "Restitution of Benefits Obtained in Breach of Another's Confidence", (1970) 86 L.Q.R. 463.
21. Per Lord Denning M.R. in Fraser v. Evans [1969] 1 Q.B. 349, 361.
22. Seager v. Copydex Ltd. [1967] R.P.C. 349, 368; [1967] 1 W.L.R. 923, 931.

width and it is often difficult to know whether these are of general application or are relevant only to the particular category of case under consideration; moreover, judges have shown a marked reluctance to define the limits of the jurisdiction. Nevertheless, it is possible to say that before an action for breach of confidence can succeed, it must be shown that:

- (a) there is in existence an obligation of confidence regarding information;
- (b) the information itself has the necessary quality of confidence about it; and
- (c) there has been, or is in contemplation, an unauthorised disclosure or use of the information.

(a) The Obligation of Confidence

18. In discussing the circumstances in which an obligation of confidence may arise, it is convenient to consider separately the position of -

- (i) the original parties to the confidence;
- (ii) the third party who acquires confidential information as a result of a breach of confidence on the part of one of the original parties;
- (iii) the third party who acquires confidential information without any breach of confidence on the part of one of the original parties;
- (iv) the party who acquires confidential information which has never been confided to anyone.

- (i) The original parties to the confidence.

19. Obligations of confidence binding on the original parties are frequently imposed by the express or implied terms of a contract. In so far as such obligations are enforceable as a breach of contract, they are outside the scope of this Paper. But it is now clear (despite an obiter dictum to the contrary by Lord Greene M.R. in Vokes Ltd. v. Heather²³) that two parties in a contractual relationship may also be subject to a wider obligation of confidence, independent of contract²⁴, and that this wider obligation may extend to third parties into whose hands the confidential information falls. Equally, it is clear that such an obligation can arise between two parties who are not in a contractual relationship at all. What sort of relationship then is necessary before an obligation of confidence can arise? There is no doubt that in some forms of relationship the element of confidence is so marked that they can be regarded as being essentially relationships of confidence quite apart from any element of contract. Thus there is firm judicial authority that the relationships between an employer and his employee²⁵, between manufacturers and traders associated in a joint business enterprise²⁶ and between husband and wife²⁷ are of a confidential nature. In the field of professional relationships, although only communications passing between the legal adviser and his client are entitled to the privilege of protection from disclosure in evidence before a court of law²⁸,

23. (1945) 62 R.P.C. 135, 141-2. The dictum has never been followed and it is inconsistent with the later decisions.

24. See Ackroyds (London) Ltd. v. Islington Plastics Ltd. [1962] R.P.C. 97 where it was held that there was an implied condition of a contract and further an obligation of confidence imposed on the defendants not to use a tool except for the manufacture of goods on behalf of the plaintiffs.

25. Cranleigh Precision Engineering Ltd. v. Bryant [1966] R.P.C. 81; [1965] 1 W.L.R. 1293.

26. Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd. (1948) 65 R.P.C. 203; [1963] 3 All E.R. 413.

27. Duchess of Argyll v. Duke of Argyll [1967] Ch. 302.

28. Wheeler v. Le Marchant (1881) 17 Ch.D. 675.

there is judicial recognition that other professional men²⁹ - in particular, the banker, the accountant and the doctor - are, at least to some extent, under an obligation of confidence in regard to the affairs of their clients and that the clergyman³⁰ is under an obligation not to disclose the secrets of the confessional. The confidential nature of the relationship between the journalist and his informant has been acknowledged³¹ and even the photographer taking a portrait at the subject's request is under some obligation of confidence towards the subject of the portrait³². But these are only examples of typical confidential relationships; to compile an exhaustive list of such relationships would not be practicable, and, even if it were, the list would be of limited value because the extent of the obligation of confidence varies according to the exact nature of the relationship³³. Consequently, the most that can be said is that an obligation of confidence will arise when the circumstances import it and that this is a matter to be determined by the court in each case. The only really helpful general test that has so far emerged is that put forward in Coco v. A.N. Clark (Engineers) Ltd.³⁴ where Megarry J. suggested that "that hard-worked creature, the reasonable man" should be pressed into service once more and

29. As to professional men generally and bankers in particular, see Tournier v. National Provincial and Union Bank of England [1924] 1 K.B. 461; and as to accountants see Chantry Martin (A Firm) v. Martin [1953] 2 Q.B. 286, 294.

30. Broad v. Pitt (1828) 3 C. & P. 518, 519.

31. Attorney-General v. Clough [1963] 1 Q.B. 773; Attorney-General v. Mulholland, Attorney-General v. Foster [1963] 2 Q.B. 477.

32. Pollard v. Photographic Co. (1888) 40 Ch.D. 345.

33. See the remarks of Bankes L.J. in Tournier v. National Provincial and Union Bank of England [1924] 1 K.B. 461, 474: "The privilege of non-disclosure to which a client or a customer is entitled may vary according to the exact nature of the relationship between the client or the customer and the person on whom the duty rests. It need not be the same in the case of the counsel, the solicitor, the doctor, and the banker, though the underlying principle may be the same".

34. [1969] R.P.C. 41, 48.

went on to formulate the test as follows:

"It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence."

Coco was a case involving information of a commercial and industrial nature which was given with the avowed object of enabling the plaintiffs and the defendants to cooperate in the manufacture of a moped engine, and in cases of this sort the courts do not seem to find great difficulty in deducing from the circumstances the evidence of an obligation of confidence. But there seems to be no reason why the "reasonable man" test should not be equally applicable to cases involving information of a personal nature.

- (ii) The third party who acquires confidential information as a result of a breach of confidence on the part of one of the original parties.

20. Following the cases of Prince Albert v. Strange³⁵ and Lord Ashburton v. Pape³⁶, it was said in Duchess of Argyll v. Duke of Argyll³⁷ that:

"an injunction may be granted to restrain the publication of confidential information not only by the person who was a party to the confidence but by other persons into whose possession that information has improperly come."

The application of this principle is clear where the third party knew, or ought to have realised from the circumstances, that he was being given information in breach of confidence; but is it equally applicable where, at the time when he

35. (1849) 1 H. & Tw. 1; 1 Mac. & G. 25.

36. [1913] 2 Ch. 469.

37. [1967] 1 Ch. 302, 333.

receives the information, he lacks any actual or constructive knowledge of a breach of confidence? The question is of particular importance to the third party who is a purchaser of information in good faith: he may have paid a considerable sum for it or have incurred substantial expenditure (for instance on premises and machinery) in order to exploit it. In Morison v. Moat³⁸, Turner V.C. expressed the view that a purchaser for value of a secret without notice of any obligation affecting it might be in a different position from other recipients of the information. The point was raised in Stevenson, Jordan & Harrison Ltd. v. MacDonald & Evans³⁹ where an injunction was sought to restrain a publishing firm from publishing a book which was alleged to contain material obtained by a breach of confidence; the defence was that as the publishers were bona fide purchasers for value without notice of any equity affecting their title and as they had no reason to suspect any breach of confidence at the time they contracted to publish the book and received the manuscript, they could not later be affected by any claim based on breach of confidence. At first instance, the defence was rejected in view of the fact that the publishers had received express notice of the alleged breach of confidence prior to publication; and Lloyd-Jacob J. reasoned that⁴⁰:

"The wrong to be restrained is not the entry into the contract to publish, but the act of publishing, and an innocent mind at the time of the former cannot overcome the consequences of full knowledge at or before the time of the latter."

On appeal⁴¹, it was held that on the facts a breach of confidence on the part of the original parties had not been

38. (1851) 9 Hare 241, 263.

39. (1951) 68 R.P.C. 190.

40. Ibid., 195.

41. (1952) 69 R.P.C. 10, 16, sub. nom. Stevenson, Jordan & Harrison Ltd. v. MacDonald & Evans.

established and Lord Evershed M.R. declined to express any view in affirmation or disaffirmation of Lloyd-Jacob J.'s remarks. However, in Fraser v. Evans⁴² Lord Denning M.R. indicated that even if the recipient of information came by it innocently, he could be restrained once he got to know that the information was originally given in confidence. Lord Denning did not deal with the possibility of obtaining an injunction against the user or discloser of information who has purchased that information in good faith and for value, although the decision at first instance of Lloyd-Jacob J. in Stevenson's case suggests that an injunction would lie. It is uncertain whether any other relief, such as an account of profits, can be obtained in respect of the use or disclosure of information at a time when the user or discloser was unaware of the confidential character of the information⁴³.

- (iii) The third party who acquires confidential information without any breach of confidence on the part of one of the original parties.

21. A breach of confidence on the part of one of the original parties is not necessarily the source from which a third party acquires confidential information. If he acquires the information without any breach of confidence by one of the original parties, does the obligation of confidence still extend to him? Let us consider some of the circumstances in which a third party may come into possession of information by independent means:

- (1) He may obtain it by a deliberate act on his part which involves the use of unlawful means, as where he breaks into the premises

42. [1969] 1 Q.B. 349, 361.

43. The extent to which remedies are available in the analogous situations of innocent use arising in the fields of patents, trade marks and copyright is discussed in para. 78 below in the course of our consideration of proposals for reforming the law of confidence.

of one of the original parties in order to read confidential files kept there.

- (2) He may obtain it by a deliberate act on his part which involves the use of means which are not unlawful but are nevertheless reprehensible, as where, being the owner of a restaurant, he places an electronic device in a position where it can record a confidential conversation between the original parties.
- (3) He may obtain it accidentally, as where he reads a letter wrongly addressed to him or he unintentionally overhears a confidential discussion between A and B either because he is too near to them to avoid it or perhaps simply as a result of a crossed line on his telephone.

There are dicta in some cases which appear to indicate that the courts will import an obligation of confidence in some of the circumstances referred to in this paragraph. Thus in Lord Ashburton v. Pape⁴⁴ Swinfen Eady L.J. said:

"The principle upon which the Court of Chancery has acted for many years has been to restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged."
(Emphasis added).

But in fact the confidential information in this case was obtained because of "a gross breach of duty" on the part of one of the parties to the confidence and there seems to be no direct authority for the proposition that a person owes a duty

44. [1913] 2 Ch. 469, 475.

of confidence in respect of information which he has obtained without any breach of duty on the part of any of the original parties to the confidence. Some commentators, however, take the view that, at least in some of these cases, the courts would not hesitate to import an obligation of confidence. J. and R. Jacob⁴⁵ regard the action for breach of confidence as a general remedy for industrial espionage. Gareth Jones⁴⁶ considers that the vital issue is whether the defendant has obtained the information by reprehensible means; and that on this basis the courts would impose the obligation on one who bugs a telephone but not on one who merely overhears a confidential conversation.

- (iv) The party who acquires confidential information which has never been confided to anyone.

22. So far we have been assuming that there are at least two original parties to a confidence and that confidential information has either already been confided by one to the other or is in the course of being so confided when it is intercepted. It is quite possible, though, for a person to have confidential information which he intends to keep wholly to himself. One example would be a scientist who has papers giving details of the discovery of a new formula which he considers to be so dangerous that he has resolved never to disclose it to anyone; a more commonplace example would be a person who has a private diary in which, purely for his own satisfaction, he has entered intimate details of his personal life. Suppose that the papers or the diary are lost or stolen and subsequently come into the possession of another person who realises from looking at them that he was never intended to have either the documents or the information they contain; is he thereupon bound by an obligation of confidence to the

45. "Confidential Communications", (1969) 119 N.L.J. 133.

46. "Restitution of Benefits Obtained in Breach of Another's Confidence", (1970) 86 L.Q.R. 463, 482-3.

owner of the papers or the diary? In the present state of the law the answer to this question is purely speculative. There are no precedents in the case law for a breach of confidence action involving information which a person has not communicated to anyone else. Although it is conceivable that a court would take the view that the scope of the action is broad enough for it to grant relief in these circumstances, the implications of this view of the law go very far. If this view were to find acceptance, it seems fair to say that English law would come very close to recognising the existence of a general right of privacy.

(b) The Confidential Information

23. In Coco v. A.N. Clark (Engineers) Ltd.⁴⁷, Megarry J. stated what appears to be the principal rule regarding the confidentiality of the information itself in the following terms:

"As Lord Greene said in the Saltman case⁴⁸... 'something which is public property and public knowledge' cannot per se provide any foundation for proceedings for breach of confidence. However confidential the circumstances of communication, there can be no breach of confidence in revealing to others something which is already common knowledge."

Where the information in question is either wholly private in nature or wholly public knowledge, the principle is simple to apply; but in many of the cases where industrial information is involved, the information concerned is of a mixed nature, being partly public and partly private, and there are severe practical difficulties in applying the law of confidence only

47. [1969] R.P.C. 41, 47.

48. Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd. (1948) 65 R.P.C. 203, 215; [1963] 3 All E.R. 413, 415.

to the information in the private sector. These difficulties have been resolved to some extent by invoking the "springboard doctrine" enunciated in Terrapin⁴⁹ and Cranleigh⁵⁰ whereby the possessor of mixed information, some of it in the private sector, is placed under a special disability to ensure that he does not get an unfair start over his competitor. The basis of the doctrine is that since the possessor of the mixed information has been given a head start over the general public he is in a unique position to exploit it and he should not subsequently be allowed to plead that he has been released from his obligation of confidence simply because the features which were originally confidential have subsequently become ascertainable by a member of the general public not subject to the obligation of confidence. The springboard doctrine can only apply where some features of the information were originally in the private sector, but the cases show that these features can be of quite a minor nature⁵¹ or consist simply of knowledge of how to apply information in the public domain⁵². The doctrine has so far been applied only to the law of trade secrets and it is, indeed, difficult to see any real scope for its application to obligations of confidence concerning purely personal information.

24. An important limitation affecting the confidentiality of information is that imposed by the well-known common law principle enunciated in cases like Herbert Morris Ltd. v. Saxelby⁵³ that it is against public policy to prevent a former

49. Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd. [1960] R.P.C. 128, 130 (footnote).

50. Cranleigh Precision Engineering Ltd. v. Bryant [1966] R.P.C. 81; [1965] 1 W.L.R. 1293.

51. See e.g. Seager v. Copydex Ltd. [1967] R.P.C. 349, 368; [1967] 1 W.L.R. 923, 932; the judge at first instance thought that the information in question was not significant.

52. See e.g. Cranleigh Precision Engineering Ltd. v. Bryant [1966] R.P.C. 81; [1965] 1 W.L.R. 1293, where the information related to the existence of a patent.

53. [1916] 1 A.C. 688.

employee from making use of his ordinary skills, experience and ability and carrying them forward somewhere else. A full discussion of these cases is outside the scope of this Paper, but it is clear that in many instances difficult distinctions have to be drawn between the defendant who has acquired confidential information in the course of his employment (which he is not entitled to use) and the defendant who has acquired a general experience and skill in a specialised field of employment (which he is entitled to use). Difficulties of this sort arose in Printers & Finishers Ltd. v. Holloway⁵⁴ where the court refused to grant an injunction restraining an ex-employee from disclosing to his present employers his memory of particular features of the plaintiff's plant, being knowledge not readily separable from his general knowledge of the flock printing process and his acquired skill in manipulating a flock printing plant. The practical issue that arises was illustrated by Cross J. as follows⁵⁵:

"Suppose such [a former employee] to be told by his new employers that at this or that stage in the process they encounter this or that difficulty. He may say to himself: "Well, I remember that on the corresponding piece of machinery in the other factory such-and-such a part was set at a different angle or shaped in a different way"; or again, "When that happened we used to do this and it seemed to work", "this" being perhaps something which he had been taught when he first went to the other factory, or possibly an expedient which he had found out for himself by trial and error during his previous employment. Recalling matters of this sort is, to my mind, quite unlike memorising a formula or a list of customers or what was said (obviously in confidence) at a particular meeting."

Cross J.'s conclusion was that a man of average intelligence and honesty would know whether in any particular instance there was anything wrong in putting information regarding features of his former employer's plant at the disposal of his new

54. [1965] R.P.C. 239; [1965] 1 W.L.R. 1.

55. [1965] R.P.C. 239, 255-6; [1965] 1 W.L.R. 1, 5-6.

employer and that it would be futile for the law to seek to enforce in this field standards which would be rejected by the ordinary man. The broad test he formulated was as follows:

"If the information in question can fairly be regarded as a separate part of the employee's stock of knowledge which a man of ordinary honesty and intelligence would recognise to be the property of his old employer, and not his own to do as he likes with, then the court, if it thinks that there is a danger of the information being used or disclosed by the ex-employee to the detriment of the old employer, will do what it can to prevent that result by granting an injunction."

(c) Unauthorised Disclosure or Use of the Information

25. In its broadest form, the duty of a person under an obligation of confidence is to refrain from using or disclosing the information to which the obligation relates without the consent of the person to whom the obligation is owed⁵⁶. But some recent decisions suggest that the duty is not always as broad as this and can be satisfied in an appropriate case simply by paying reasonable compensation for the use of the information. In Seager v. Copydex Ltd.⁵⁷ Lord Denning M.R. said that the defendant

"should not get a start over others by using the information which he received in confidence. At any rate, he should not get a start without paying for it"

and the court, instead of granting an injunction, ordered damages to be assessed on the basis of reasonable compensation

56. See e.g. the dictum of Lord Greene M.R. in Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd. (1948) 65 R.P.C. 203, 213; [1963] 3 All E.R. 413, 414 quoted in para. 8 above.

57. [1967] R.P.C. 349, 368; [1967] 1 W.L.R. 923, 931-2.

for the use of the confidential information. In Coco v. A.N. Clark (Engineers) Ltd.⁵⁸ Megarry J. adverted to some of the practical difficulties which arise from the application of the duty in its broadest form:

"Suppose a case where there is a confidential communication of information which is partly public and partly private; suppose that the recipient of the information adds in confidence ideas of his own, improving the initial scheme; and suppose that the parties then part, with no agreement concluded between them. How is a conscientious recipient of the ideas to comply with the requirements that equity lays upon him? ... Suppose that the only confidential information communicated is that some important component should be made of aluminium instead of steel and with significant variations in its design and dimensions. The recipient knows that this change will transform a failure into a success. He knows that, if he had persevered himself, he might have come upon the solution in a week or in a year. Yet he is under a duty not to use the confidential information as a springboard or as giving him a start.

"What puzzles me is how, as a law-abiding citizen, he is to perform that duty. He could, I suppose, commission someone else to make the discovery anew, carefully abstaining from saying anything to him about aluminium or the design and dimensions which will achieve success; but this seems to me to be artificial in the extreme. Yet until this step is taken and the discovery made anew, he cannot make use of his own added ideas for the further improvement of the design which he had already communicated in confidence to the original communicator, ideas which would perhaps make a success into a triumph. He cannot build his superstructure as long as he is forbidden to use the foundations. Nor is the original communicator in a much better case. He is free to use his own original idea, which converted failure into success; but he cannot take advantage of the original recipient's further ideas, of which he knows, until such time as he or someone commissioned by him would, unaided by any confidence, have discovered them.

"For those who are not law-abiding and conscientious citizens there is, I suppose, a simple answer: ignore the duty, use the information, and then pay damages. This may be the course which

58. [1969] R.P.C. 41, 49-50.

Lord Denning envisaged in the Seager case ... I also recognise that a conscientious and law-abiding citizen, having received confidential information in confidence, may accept that when negotiations break down the only honourable course is to withdraw altogether from the field in question until his informant or someone else has put the information into the public domain and he can no longer be said to have any start. Communication thus imposes on him a unique disability. He alone of all men must for an uncertain time abjure this field of endeavour, however great his interest. I find this scarcely more reasonable than the artificiality and uncertainty of postponing the use of the information until others would have discovered it.

"The relevance of the point, I think, is this. If the duty is a duty not to use the information without consent, then it may be the proper subject of an injunction restraining its use, even if there is an offer to pay a reasonable sum for that use. If, on the other hand, the duty is merely a duty not to use the information without paying a reasonable sum for it, then no such injunction should be granted."

Megarry J. then came to the conclusion that in the circumstances of that case the essence of the duty seemed more likely to be that of not using without paying rather than of not using at all. But, bearing in mind the case of Duchess of Argyll v. Duke of Argyll⁵⁹, he recognised that in fields other than industry and commerce the duty may exist in the more stringent form.

26. The view that the duty exists in its more stringent form in the case of a breach of confidence involving personal information is implicitly supported by the judgment in Fraser v. Evans⁶⁰, where the duty was expressed simply as a duty not to divulge to the world information received in confidence and it seems to have been assumed that there was no question of the defendants "buying" the information. But it is by no means clear that the duty exists only in its less stringent

59. [1967] Ch. 302.

60. [1969] 1 Q.B. 349, 361.

form in all cases of a breach of confidence involving industrial or commercial information. It is probably nearer the truth to say that in these cases the courts will apply the duty in that form which seems the most reasonable in the circumstances. In other words, the court will determine, in the light of the facts of each case, whether an injunction or damages is the appropriate remedy; thus in Bostitch Inc. v. McGarry & Cole Ltd.⁶¹ Cross J. said:

"When this case comes to trial, it may be held, on a fuller examination of all the relevant facts and on examination and cross-examination of all the witnesses, that the extent of the use of the confidential information makes damages rather than an injunction the appropriate remedy."

27. In whatever form the duty exists, is it breached if the confidential information is disclosed or used by the confidant not deliberately but as a result of his negligence? Where the parties are in a contractual relationship, there is no doubt that the confidant is in breach of his contractual obligations if the information is disclosed as a result of his failure to take reasonable care of it. Thus in Weld-Blundell v. Stephens⁶² an accountant investigating a company on behalf of his client negligently left his letter of instructions at the offices of the company where it came to their notice; it was held that he was in breach of his duty to his client in failing to use reasonable care to keep secret the contents of the letter. Where the parties are not in any contractual relationship, the position is more difficult. Suppose, for example, that A discloses to B the specifications of an unpatented invention which he hopes to interest B in buying; but before any contractual relationship has been formed, B carelessly loses the specifications which are found and exploited by C. On the one hand, it is arguable that a duty to take reasonable care of the specifications is necessary to complete

61. [1964] R.P.C. 173, 177.

62. [1920] A.C. 956.

the obligation of confidence and that, without it, information imparted in confidence would be seriously at risk. On the other hand, if the disclosure to B has been entirely unsolicited, it scarcely seems reasonable that he should be obliged to take positive measures to ensure that the information does not go any further; his position is closely akin to that of the involuntary bailee and on that analogy it is arguable that no liability for negligence should attach to him. The rules have yet to be worked out.

28. Is it necessary to show that the unauthorised disclosure or use of confidential information will be to the detriment of the person to whom the obligation of confidence is owed? This question was raised but not answered in Coco v. A.N. Clark (Engineers) Ltd.⁶³ Detriment to the plaintiff plainly existed in this case and in most cases it will provide the whole motivation for the plaintiff's action.-- But as Megarry J. pointed out:

"I can conceive of cases where a plaintiff might have substantial motives for seeking the aid of equity and yet suffer nothing which could fairly be called detriment to him, as when the confidential information shows him in a favourable light but gravely injures some relation or friend of his whom he wishes to protect."

For this reason, Megarry J. left open the possibility that the existence of "detriment" was not an essential requisite.

THE DEFENCE OF JUST CAUSE OR EXCUSE

29. Despite the existence of an obligation of confidence, the person subject to the obligation may break it if he has "just cause or excuse for doing so"⁶⁴. The origin of this important defence is to be found in Gartside v. Outram⁶⁵ where

63. [1969] R.P.C. 41, 48.

64. Fraser v. Evans [1969] 1 Q.B. 349, 361.

65. (1856) 26 L.J. Ch. 113.

the court declined to grant an injunction restraining a former employee of the plaintiffs from disclosing confidential information showing that the plaintiffs had been conducting their business in a fraudulent manner. Wood V.C., in a memorable phrase, declared that "there is no confidence as to the disclosure of iniquity"⁶⁶, and he went on to say:

"You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part: such a confidence cannot exist."

30. In Weld-Blundell v. Stephens⁶⁷ it was sought to invoke the defence to excuse the disclosure of confidential information which was of a defamatory character. In this case a client sued his accountant for breach of an implied duty to keep secret a letter of instructions which contained a libel and which, following the careless conduct of the accountant, subsequently came into the hands of the subjects of the libel. In the Court of Appeal, Gartside v. Outram⁶⁸ was treated as a decision of the Court of Chancery not to exercise its extraordinary jurisdiction in equity in favour of a plaintiff who did not come to the Court "with clean hands", and Warrington L.J. declined to accept the existence of a wide principle at common law under which a confidential agent would be justified in disclosing a confidential document because it was libellous or contained evidence of a private wrong. He said⁶⁹:

"Such a principle, if it existed, would be of very widespread application. A man discloses to his confidential agent that he has committed a trespass to land or goods, and the agent might with impunity communicate this to the persons concerned with disastrous results to his employer. Indeed, I can see no distinction in this respect between cases of contract and cases of tort.

66. Gartside v. Outram (1856) 26 L.J. Ch. 113, 114.

67. [1919] 1 K.B. 520.

68. (1856) 26 L.J. Ch. 113.

69. [1919] 1 K.B. 520, 535.

Unless there be such a distinction, the disclosure by the agent of evidence of a breach of contract on his employer's part would be no breach of his duty to his employer. On the whole I can see no reason founded on public policy or any other ground why an agent should be at liberty to disclose evidence of a private wrong committed by his principal."

In the House of Lords⁷⁰, no attempt was made to impugn the correctness of this portion of the judgment and Viscount Finlay said that it was obviously right, adding:

"Any decision to the contrary would involve consequences at once extravagant and unreasonable. It would be startling if it were the law that an agent who is negligent in the custody of a letter handed to him in confidence by his principal might plead in defence that the letter was libellous. There may, of course, be cases in which some higher duty is involved. Danger to the State or public duty may supersede the duty of the agent to his principal. But nothing of that nature arises in this case."

31. More recent decisions of the Court of Appeal have, however, given the defence a fresh impetus. In Initial Services Ltd. v. Putterill⁷¹ a former sales manager of the plaintiff's laundering and towel supply business had disclosed to a daily newspaper information obtained from his employment and alleged that the information showed, first, that a group of firms had entered into an agreement to keep up prices which had not been registered under the Restrictive Trade Practices Act 1956, and secondly, that the plaintiff firm had issued a misleading trade circular blaming increased charges on selective employment tax when the increases would in fact bring in substantial additional profits. The Court of Appeal refused to strike out the defence claim that the exception of "iniquity" was wide enough to justify the defendant in making his disclosures and it rejected a submission that the exception was confined to

70. [1920] A.C. 956, 965.

71. [1968] 1 Q.B. 396.

cases where the confidential information related to crime or fraud. Lord Denning M.R. said⁷²:

"It extends to any misconduct of such a nature that it ought in the public interest to be disclosed to others... The exception should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always - and this is essential - that the disclosure is justified in the public interest."

In Fraser v. Evans⁷³ Lord Denning added that the word "iniquity" did not express a principle but was merely an instance of just cause or excuse for breaking confidence; and in that case and again in Hubbard v. Vosper⁷⁴ he repeated the test of "public interest". Public interest is obviously a very flexible concept and in the undeveloped state of the case law it is difficult to form any definite conclusion regarding its scope.

32. . However, it does appear that there may be some limits on the extent of the disclosure of confidential information for just cause. In Initial Services Ltd. v. Putterill⁷⁵ Lord Denning M.R. said:

"The disclosure must, I should think, be to one who has a proper interest to receive the information. Thus it would be proper to disclose a crime to the police; or a breach of the Restrictive Trade Practices Act to the registrar. There may be cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field, even to the press."

In this case it was held that it was at least arguable that disclosure of the information to the press could be justified, but the court was clearly influenced by the fact that the defendant received no payment for the information and that his

72. Ibid., 405.

73. [1969] 1 Q.B. 349, 362.

74. [1972] 2 Q.B. 84, 95.

75. [1968] 1 Q.B. 396, 405-6.

motivation was a desire to protect the public. The position of a defendant who disclosed confidential information out of malice or spite or who sold it to a newspaper for money or reward was expressly reserved, Lord Denning saying⁷⁶ that "it is a great evil when people purvey scandalous information for reward".

THE REMEDIES FOR BREACH OF CONFIDENCE

33. The principal remedy for breach of confidence is an injunction restraining the defendant from disclosing or using the confidential information. Failure to obey an injunction constitutes contempt of court, punishable by fine or imprisonment. An injunction may be appropriate even when a limited disclosure or use of the information has taken place and it is desired to prevent further disclosure or use. Where an interlocutory injunction is applied for, it has been held⁷⁷ that the right course for the judge is to look at the whole case and have regard not only to the strength of the claim but also to the strength of the defence. The injunction is an equitable remedy and the decision to grant or refuse one is therefore within the discretion of the court; and in exercising this discretion the court will be particularly concerned with the question of whether the plaintiff comes to court "with clean hands"⁷⁸.

34. Another major remedy is the award of damages but the basis on which the courts exercise jurisdiction to award damages is not entirely clear and raises the issue of the proper foundation for a claim based on breach of confidence.

76. Ibid., 406.

77. Hubbard v. Vosper [1972] 2 Q.B. 84, 96.

78. Thus in Hubbard's case above, one of the plaintiffs, the Church of Scientology, had used "deplorable means" to protect their secrets and therefore did not approach the court with clean hands.

Damages are a common law remedy⁷⁹ and if the foundation for breach of confidence proceedings is indeed a broad principle of equity, the court's jurisdiction to award damages would prima facie be derived from Lord Cairns' Act⁸⁰, under which damages may be awarded to the injured party either in addition to or in substitution for an injunction. In Nichrotherm Electrical Co. Ltd. v. Percy⁸¹ Lord Evershed M.R. raised, without deciding, the question whether damages could be awarded for a breach of confidence apart from Lord Cairns' Act. This question has not been referred to specifically in subsequent cases where damages have been awarded but it would seem to follow, from the decision of the Court of Appeal in Seager v. Copydex Ltd. (No. 2)⁸² where the basis for the assessment of damages was said to be tortious on the analogy of the law of conversion of goods, that damages may now be awarded independently of any prayer for equitable relief.

35. What are the principles upon which damages should be assessed? The only real discussion is to be found in Seager v. Copydex Ltd. (No. 2)⁸³. Salmon L.J. summed up the conclusions of the court as follows:

"The damages ... are equal to the market value of the confidential information wrongly taken by the defendants - the market value, that is to say, as between a willing buyer and a willing seller. Now, this depends very much upon the true character of the confidential information. If the confidential information was not concerning something which can truly be called an invention, but was the kind of information which the defendants could for a fee have obtained

79. As such, they may of course be awarded for breach of contract where a confidential obligation is imposed by the express or implied terms of a contract.

80. Chancery Amendment Act 1858, s.2.

81. [1957] R.P.C. 207, 213-4.

82. [1969] 1 W.L.R. 809, 813, 815.

83. Ibid., 814.

from any competent consultant, then the damages presumably would be whatever might be a reasonable fee in the circumstances. If, however, the confidential information was information about a true invention, then it would be the value of the invention. Inventions are usually sold on the basis of a royalty; but damages, of course, have to be given once and for all, and would be the capitalised value of the royalty."

This formula met the circumstances of this particular case where industrial information had been wrongfully used and the defendant was compensated for the use. But there is no authority in the case law regarding the principles on which damages should be awarded for the wrongful use of information which is of a purely personal nature.

36. As an alternative to damages, but in addition to an injunction, an account of profits may be ordered, that is, the defendant may be ordered to pay to the plaintiff the profit which he has made by his wrongful act. In Peter Pan Manufacturing Corporation v. Corsets Silhouette Ltd.⁸⁴, where the defendants had manufactured particular styles of brassières from designs shown to them in confidence, it was held that the amount of the profit was simply the difference between the amount expended by them in manufacturing the articles and the price they received on the sale of the articles. The court declined to uphold a contention that the defendants should be liable only for the difference between the profits actually made with the aid of the confidential information and those which would have been made if the articles had been manufactured without the aid of that information; apart from anything else, "the defendants could not have manufactured [the brassières] at all without the use of the confidential information".

84. [1963] R.P.C. 45, 60; [1964] 1 W.L.R. 96, 108-9.

37. Finally, the defendant may be ordered either to destroy material containing confidential information and to verify such destruction on oath or to deliver up the material to the plaintiff. But such an order can only be made on the basis that the property in the material remains in the plaintiff and there is a conflict of authority as to whether this is the rule in breach of confidence cases. In Industrial Furnaces Ltd. v. Reaves⁸⁵ where the court made an order for delivery up in addition to granting an inquiry as to damages, Graham J. said:

"A parallel was drawn between patent cases and breach of confidence cases to some extent, but it seems to me that on the material point - that is, to whom the infringing material belonged, there is a difference. It has been clearly laid down in patent cases that the property in the infringing article remains in the infringer. In breach of confidence cases, however, the matter is to my mind analogous to the position in respect of trust property; and in my judgment in the normal case the property in the information which has been stolen will remain in the plaintiff. Prima facie, therefore, if he wants it, the plaintiff should be entitled to delivery up."

As against this, in Seager v. Copydex Ltd. (No. 2)⁸⁶, where no order for delivery up was made, the court held that "once the damages are assessed and paid, the confidential information belongs to the defendants"; and if the information was patentable, "they would be entitled to the benefit of the patent as if they had bought it".

PART III

THE PROBLEMS OF THE EXISTING LAW AND THE NEED FOR REFORM

38. From this broad survey of the existing law, it is evident that the jurisdiction of the courts to grant relief in

85. [1970] R.P.C. 605, 627.

86. [1969] 1 W.L.R. 809, 813.

cases of breach of confidence is now well established. The action will lie where it can be shown that an obligation of confidence exists in respect of information which has the necessary quality of confidence about it and that an unauthorised disclosure or use of the information is contemplated or has taken place. The major defence to such an action is that the defendant has just cause or excuse for his disclosure or use of the information and the main forms of relief are an injunction, damages or an account of profits.

39. But although the broad outlines of the jurisdiction can be discerned, it is equally evident that the action has yet to be fully developed by the courts and that many problems of a fundamental character remain. It is now necessary to consider briefly what these problems are.

THE NATURE OF THE PROBLEMS.

(a) The Basis of the Jurisdiction

40. There is a continuing doubt as to the ultimate legal foundation on which the whole jurisdiction rests. Since Saltman's case⁸⁷, it has become clear that it is not based solely on contract and the modern tendency is to rely, in the main, on equitable principles to found the jurisdiction; but the courts do not hesitate on occasion to develop particular aspects of the action by reference to other branches of the law, such as the law of property with its remedies of actions for conversion and trespass to goods. The question of the basis of the jurisdiction is not any longer a matter of particular importance in establishing the existence of the jurisdiction; the cases themselves provide ample authority. But it remains a vital question in forecasting the future development of the law. No one can say with any assurance how a particular issue will be decided in the future if it is not certain, for

87. Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd. (1948) 65 R.P.C. 203; [1963] 3 All E.R. 413.

instance, whether the courts will apply equitable or tort principles.

(b) The Different Categories of Information Protected by the Action

41. It is uncertain to what extent principles evolved in connection with cases involving information of a commercial or industrial nature (which for convenience may be called trade secrets cases) are applicable to cases involving information of a mainly personal nature, such as the details of an individual's private life and experience (which for convenience may be called privacy cases). Although the same action covers both categories, the bulk of the case law is made up of trade secrets cases. It is evident that in many respects (such as, for instance, the applicability of the defence of just cause or excuse) the principles are broadly the same. But in other respects the principles applied in trade secrets cases seem to be either irrelevant to a privacy case or to produce results which, on the face of things, are patently wrong. Thus it is difficult to see the relevance of the springboard doctrine - an important feature of the trade secrets case - to a case where no commercial considerations are involved: the whole doctrine rests on the thesis that a breach of confidence should not be allowed to give a trader an unfair advantage over his competitor. Then again, the principle applied in some recent trade secrets cases that the defendant can purge his breach of confidence by payment (in effect by purchasing confidential information for a reasonable sum) would produce startling results if it were applied to a privacy case: the interest of the plaintiff in a privacy case lies normally not in selling the confidential information (which may have little commercial value) but in preventing the embarrassment which would result from its public disclosure and it would be intolerable if the confidences of his private life were, in effect, to be subjected to a form of compulsory acquisition.

(c) The Parties to an Obligation of Confidence

42. The extent to which persons handling confidential information become parties to an obligation of confidence is not clear. The obligation of confidence certainly extends to the original confidant and to any person who knows that confidential information in his possession has been acquired through a breach of confidence on the part of the original confidant. But to what extent, if at all, does the obligation bind a person who has obtained information which he knows to be confidential otherwise than through a breach of confidence? Does it make a difference whether the information was obtained accidentally or whether it was obtained by the use of means which are unlawful, or at least improper? Is it essential that the information should previously have been entrusted to someone in confidence, or is it sufficient that the circumstances indicate that the person from whom it was obtained regarded it as confidential - perhaps so confidential that he was not prepared to entrust it to anyone? .

(d) The Confidential Information

43. The existing law contemplates that, at any rate so far as industrial and commercial secrets are concerned, there can be no obligation of confidence in respect of information which is already common knowledge. Does this principle extend to all information which, although not generally known in fact, is capable of becoming so known because it is accessible to the public? To what extent has the principle been eroded by the application of the springboard doctrine which places the possessor of information under a special disability to ensure that he does not get an unfair start over his commercial rivals? If an obligation of confidence arises in respect of secret information and the information is wrongfully made public by a person subject to the obligation, is that person on any future occasion free to use the information as he likes or can he continue to be enjoined from using that which the whole world can now use?

(e) The Duties of Persons Subject to an Obligation of Confidence

44. There are substantial unresolved questions regarding the rights and duties of a person who is under an obligation of confidence. Does the law really contemplate alternative forms of duty - a broad duty not to use or disclose the information without the consent of the person to whom it is owed and a less stringent duty in commercial cases not to use the information without paying adequate compensation for it - or does the less stringent form of duty simply amount to saying that on using the information without the necessary consent the person doing so will be liable in damages but not to an injunction? Is a person under an obligation of confidence liable for disclosure or use resulting from his negligence, so that his duty is not merely to abstain from voluntarily disclosing or using it but also to take reasonable care to ensure that the information in his possession remains secure? Where damages have been awarded against a person for breach of confidence in respect of his use of know-how, to what extent is he thereafter entitled to treat the know-how as belonging to him, exploiting it himself or even selling it to others?

(f) Defences to the Action

45. A major defence to the action is that the defendant had just cause or excuse for breaking the confidence reposed in him. Recent judgments in the Court of Appeal indicate that the true test of the defence is whether the public interest requires the disclosure of the information to which the obligation of confidence relates; and this test is consistent with the dictum of Viscount Finlay in the House of Lords that "public duty may supersede the duty of the agent to his principal"⁸⁸. But in whichever form the defence is expressed its scope remains obscure. In the absence of a substantial body of case law there are few guide lines by which those to whom information has been entrusted in confidence can regulate their conduct.

88. Weld-Blundell v. Stephens [1920] A.C. 956, 965.

46. It is questionable whether further defences should not be available to a defendant in certain circumstances. Should there not, for instance, be a defence of privilege to cover the disclosure of information in breach of confidence in circumstances in which the disclosure would be privileged under the law of defamation? Such a case might at present be covered by the broad defence of public interest but no authority on the point exists.

47. There is also the question whether it should be a complete defence to an action for breach of confidence that the acquirer of the information obtained it for value in circumstances in which he neither knew nor ought to have known that it was subject to a duty of confidence. We find it convenient to consider this question in paragraph 49 below which deals from a broader point of view with the position of the innocent acquirer of confidential information.

(g) Remedies

48. Are the existing remedies for dealing with breaches of confidence adequate and clear? The present range of remedies appears to be unsatisfactory in at least two respects. In the first place, in a case involving the disclosure of personal information in breach of confidence, it is not clear to what extent, if at all, the plaintiff is entitled to compensation for any distress which the disclosure has caused him. A breach of confidence involving purely personal information may result in little or no loss of a strictly pecuniary nature, although the plaintiff may have suffered serious injury of a non-pecuniary kind; if he is not compensated for the non-pecuniary injury and it is too late for an injunction, he may be left without any effective remedy. Secondly, on the general issue of remedies for breach of confidence, there is an unresolved question whether the court is empowered to award exemplary or punitive damages in any circumstances.

(h) The Position of the Innocent Acquirer of Confidential Information

49. We have seen⁸⁹ that there is some doubt as to the position of a person who has acquired information without knowledge of its confidential character. First, should the acquirer in good faith and for value be free to use and disclose it even after he has learned of its confidential character? And secondly, whether or not the acquirer in good faith has paid for the information, in considering the position of the acquirer once he has learned of the confidential character of the information, should any account be taken of expenditure incurred for the purpose of exploiting the information before he has learned of its confidential character⁹⁰? He may, for example, have invested in special plant and machinery or have changed the whole nature of his business. We return to the first question when we consider, in our proposals for reform, the possibility of a defence that the information was acquired in good faith and for value⁹¹. We consider the second question in our proposals for reform at the point where we deal with the possibility of the court refusing an injunction where damages might constitute an adequate remedy⁹².

(i) Misuse of the Action

50. It is a paradox of the present law of breach of confidence that the best way to protect information may be to reveal it voluntarily in confidence to the very person from whom protection is desired, thereby putting that person under an obligation of confidence not to use the information or reveal it to others. The consequences of this are far reaching, particularly if the information is of a patentable nature.

89. See para. 20 above.

90. Stevenson, Jordan & Harrison Ltd. v. MacDonald & Evans (1951) 68 R.P.C. 190.

91. See paras. 83-84 below.

92. See paras. 115-118 below.

51. There is little doubt that an inventor who wishes to protect his invention has today a choice between using the patent law or the law of breach of confidence for that purpose and that if his invention is in a highly specialised field where the persons able to make use of his idea are readily identifiable an obligation of confidence on their part may give him better, or at any rate longer lasting, protection than he would get from a patent. A patent gives protection of an absolute nature but it is a protection which is strictly limited in time; the normal term of a patent is sixteen years⁹³, but if the invention is not commercially worked or is not worked to the fullest extent that is reasonably practicable, a compulsory licence for its use by any interested person may be granted after as little as three years⁹⁴. In contrast, an obligation of confidence gives the inventor protection - though only against the persons to whom he has disclosed his invention or persons who learn of it through them - which is unlimited in time, regardless of whether or not any use is made of the invention. Sometimes it is possible to combine the advantages of both laws. Thus an inventor may, by taking out a patent on his idea, obtain protection against the world; and by arranging for the persons who are most likely to be able to use it to receive additional details essential to the exploitation of his invention, he may ensure that his protection against them continues long after the statutory time limits under the patent laws have run out, and perhaps for ever.

52. Even if an idea is unpatentable, as where it does not involve any inventive step over what was previously known, it can still be protected by proceedings for breach of confidence against the persons to whom it is made known in confidence and this protection is equally unlimited in time. Thus a script-writer, by sending his idea for the plot of a new play to

93. Patents Act 1949, s. 22(3). The normal period may, however, be extended on various special grounds.

94. Patents Act 1949, s. 37.

other playwrights, may ensure that none of them is able to use the idea without the risk of breaking the obligation of confidence he has created; similarly a person who has an idea for a new radio or television programme may, by canvassing the idea with all the broadcasting agencies, effectively limit their freedom of action to put on such a programme. If the receiver of the idea ever uses it, even if he has honestly forgotten that it was submitted to him by a complete stranger many years ago, he is liable to be brought to account for his "unconscious use" of what he was told in confidence; honesty is no defence⁹⁵.

53. There are several reasons why use of the action for breach of confidence in the circumstances outlined in the preceding paragraphs is, or may become, open to objection. In the first place, it is questionable whether the development of a dual system for the protection of patentable ideas is desirable. The patent laws already provide a detailed statutory code in which the interests of the inventor and the public are delicately balanced. It is possible that a broad balance between these conflicting interests will eventually be achieved in the law of confidence by judicial expansion of the defence of public interest; but the extent to which the law may develop in this respect is still a matter for speculation. Secondly, because an obligation of confidence arises as soon as the recipient realises that the information has been given to him in confidence, the obligation can be imposed on him without his agreement; and it is questionable whether this should be possible, particularly where it is against the interests of the recipient to be subjected to it or where the person imposing the obligation is a complete stranger. Thirdly, there is some danger of persons communicating ideas in confidence with the sole object of laying the foundation for a future claim if the recipient of the information happens to use a similar idea; the recipient would, on using the similar idea, have great difficulty in proving that it was arrived at independently of the idea originally communicated to him. These problems can be

95. Seager v. Copydex Ltd. [1967] R.P.C. 349; [1967] 1 W.L.R. 923.

expected to become more acute as the full implications of the law of confidence come to be generally known.

IS LEGISLATIVE REFORM DESIRABLE?

54. Should the problems of the existing law be left to the courts to resolve as and when suitable cases arise without any legislative intervention at all? It can be argued that the broad nature of the present jurisdiction is part of its strength and gives it a flexibility which the courts are well equipped to utilise in developing an effective instrument capable of doing justice in the circumstances of any particular case. Some may even argue that the present jurisdiction contains the seeds of a general action for the protection of privacy and that, given time, such an action will be developed by the courts.

55. On the other hand, there are strong arguments for giving a statutory basis to the protection of information obtained in confidence or by unlawful means and for clarifying by legislation the general scope and incidents of the remedies so given. The present law is uncertain and confusing and, except perhaps in its application to trade secrets, the protection which it is capable of affording is not generally appreciated. As we have pointed out, there are serious unresolved problems even in relation to the law of trade secrets; but it is in relation to the protection of personal information that the problems are most marked. It is questionable whether a general action for the protection of privacy will ever be evolved by the courts and in any event the majority of the Younger Committee have concluded⁹⁶ that such an action would not be desirable. But whatever the merits or otherwise of a general right of privacy may be - and it is not, of course, within our province to canvass them - it is plain from the small number of cases which have so far reached the courts that the

96. Report of the Committee on Privacy, 1972 Cmnd. 5012, para. 44.

potential of the existing action for breach of confidence is not being realised. Those who suffer from a breach of confidence affecting their privacy do not in general have a financial interest which would justify them in undertaking expensive legal proceedings to test the effectiveness of the existing law and it is not right that they should be expected to bear the cost of clarifying the law. Until the effectiveness of the law has been demonstrated beyond doubt, however, it is unlikely that anyone contemplating a breach of personal privacy will be seriously deterred by the prospect of litigation.

56. Our provisional view is that there is a clear case for the enactment of legislation to clarify and reform the law. On the assumption that there is general agreement for following this course, we outline in Parts IV and V of this Working Paper our proposals for reform. We would, however, welcome views on the preliminary question of whether any legislative intervention at all is desirable.

PART IV

PROPOSALS FOR REFORM: BREACH OF CONFIDENCE

THE BROAD AIMS

57. For the purpose of formulating our proposals for reforming the law of breach of confidence, we adopt the views of the Younger Committee as to what the broad aims of the law should be. In paragraph 631 of their Report⁹⁷, they expressed the view that the following aims would be generally accepted:

- "(a) to provide remedies against the disclosure or other use of information (not already generally known) by persons in possession of that information under an obligation of confidence;

97. Report of the Committee on Privacy, 1972 Cmnd. 5012.

- (b) to make remedies available not only against a person who was entrusted by another with information in confidence but also against a third party to whom that person disclosed the information;
- (c) to protect the public interest in the disclosure of certain kinds of information, and the defendant's right of disclosure in certain privileged situations, by the provision of appropriate defences;
- (d) to afford remedies, whether by way of injunction, damages or claims for loss of profit which do justice to the reasonable claims of plaintiffs and defendants in differing situations."

58. This statement must, however, be read in the context of the Younger Report as a whole, which indicates an important limitation on the broad aims of any new law regarding breach of confidence. The event which led immediately to the appointment of the Younger Committee was the Second Reading debate in the House of Commons of the Right of Privacy Bill introduced by Mr. Brian Walden, M.P.⁹⁸ This Bill embodied the proposal that a general right of privacy should be created, infringement of which would be actionable; and one of the main issues considered by the Younger Committee was whether a general right along the lines proposed by this Bill and by other draft legislation⁹⁹ should be created. The majority of the Committee came to the conclusion that, on balance, the creation of a general right of privacy would not be justified at present¹⁰⁰

98. The text of the Bill is set out in Appendix F to the Committee's Report.

99. The texts of the other legislative proposals are similarly set out in Appendix F to the Report. They comprise earlier Bills introduced into Parliament by Lord Mancroft and by Mr. Alexander Lyon and draft Bills prepared by the National Council for Civil Liberties and by a committee of "Justice", the British Section of the International Commission of Jurists.

100. Report of the Committee on Privacy, 1972 Cmnd. 5012, para. 44. The case against a general right of privacy is argued more fully in chapter 23.

and this conclusion was accepted by the then Government when the Report was subsequently debated in Parliament¹⁰¹. Against this background to our terms of reference, we have not put forward proposals for reforming the law of breach of confidence which would broaden the scope of the law to such an extent as to amount, in effect, to the introduction of a general right of privacy under another name.

A NEW TORT OF BREACH OF CONFIDENCE

59. A fundamental defect of the present cause of action for breach of confidence is the uncertainty regarding the basis on which it rests, which in turn gives rise to uncertainty as to the course of its future development¹⁰². We believe that the time has come to remove this uncertainty and that the most satisfactory solution to the problem would be to found the action in tort. It is our provisional view that a new tort of breach of confidence should be created by statute and that the breach of confidence constituting the tort should be breach of a statutory duty of confidence not to disclose or use information acquired in confidence except to the extent that such disclosure or use is authorised by the person to whom the duty is owed. In the following paragraphs of this Part of the Working Paper we consider the necessary elements of the duty of confidence we propose and the defences and the remedies which would be appropriate to an action in tort for breach of it. We recognise that the nature of the subject makes it impracticable for these matters to be dealt with in a statute otherwise than in broad terms which would leave the courts to apply the general principles formulated by the statute to the particular circumstances of each case, but we believe that such an approach is in any event desirable, since it will preserve much of the flexibility of the present action, which is its chief merit.

101. (1973) 859 H.C. Deb. col. 1959, where Mr. Robert Carr, the Home Secretary, said: "So the Government believe that the views of the majority of the Younger Committee do carry conviction and should be accepted on this general and central issue".

102. See paras. 16 and 40 above.

60. We envisage that the new tort we propose would replace any right of action for breach of confidence which a plaintiff may have by virtue of the jurisdiction which the courts have been developing to provide remedies for breach of confidence independently of any right of action in contract. Although it would be possible for the new tort to co-exist with a right of action available by virtue of this separate jurisdiction, we can see no good reason to justify such a choice of actions; and if a plaintiff was given such a choice, much of the present uncertainty in the law of confidence would remain. Our provisional view is, therefore, that any action for breach of confidence which subsists under the existing law independently of a right of action for breach of contract should be abolished.

THE DIFFERENT CATEGORIES OF THE NEW TORT

61. Under the existing law of breach of confidence distinctions have been developing between cases involving commercial or industrial information and those involving purely personal information; and a major difficulty of the law is the uncertainty which exists regarding the extent to which principles formulated in regard to one of these categories of case are applicable to the other¹⁰³. The question therefore arises at the outset as to whether this distinction should be further developed - and if so, to what extent - or whether it would be preferable to formulate principles common to both categories of case.

62. It is clear to us that there is a distinction between a plaintiff who is seeking to protect a trade secret and one who is seeking a remedy for non-pecuniary injury and that the same principles of law will not necessarily be appropriate to both. The problem is, however, how this distinction should be drawn. We do not think that it would be satisfactory to develop different aspects of a statutory duty of confidence simply by reference to whether the content of the information concerned

103. See para. 41 above.

is of a "commercial" or of a "personal" character. Much information of a personal character - by which we understand information touching the private life and affairs of an individual - is in fact a highly saleable commodity. Almost any details of the private life and affairs of a personality well-known to the public and many details of the experiences of quite ordinary people, however intimate and personal in character they may be, are of public interest and therefore capable of commercial exploitation; and often such information is exploited by the very person to whom it relates. But while, for instance, the parents of sextuplets or of a severely handicapped child may regard the exploitation of information concerning their experiences as a legitimate means of financing the abnormal expenses of the family, they may equally regard such exploitation, even if it is profitable to themselves, as abhorrent and a gross invasion of their privacy. In this type of situation the motive of the person concerned is all important. But in itself the motive of the plaintiff is plainly not a satisfactory criterion by reference to which different aspects of a statutory duty of confidence can be formulated.

63. Having regard to these difficulties, it seems to us that the problem is best approached by taking into account both the nature of the harm which a plaintiff is liable to sustain by the misuse of information subject to a duty of confidence and whether the information in question in itself relates to the plaintiff or has no particular relationship to him. This leads us to suggest that the new tort should be divided into three categories, as follows:

Category I - The disclosure or use of information which would, in whole or in part, deprive the person to whom a duty of confidence is owed of the opportunity himself to obtain pecuniary advantage by the publication or use of such information.

A typical example would be a breach of the duty of confidence in respect of information consisting of the particulars of an

invention which is published or used by the defendant, causing pecuniary loss to the plaintiff arising from his inability to exploit it. A further example would be where a person has entrusted the story of his life to another who in breach of confidence publishes that information, thereby reducing the pecuniary advantage which that person could expect from publishing his autobiography.

Category II - The disclosure of information relating to the person to whom a duty of confidence is owed (the plaintiff) which the person subject to the duty (the defendant) knew, or ought to have known, would cause the plaintiff pecuniary loss and which in fact causes the plaintiff pecuniary loss.

An example would be where the defendant publishes information in breach of confidence that the plaintiff is divorced in circumstances in which the defendant knows or ought to know that, owing to the attitude of the plaintiff's employer, publication of this information will lead to the plaintiff's dismissal.

Category III - The disclosure of information relating to the person to whom a duty of confidence is owed which would be likely to cause distress to a reasonable person in his position and which in fact causes him distress.

Thus, if a person informs another in confidence that he is a homosexual and the confidence is broken, the person who gave the information would have a cause of action under this category if he could establish that to be labelled as a homosexual would be likely to cause distress to any reasonable man in his position and that he in fact suffered distress thereby.

64. We recognise that these categories would not cover all the situations where information disclosed in breach of confidence may injuriously affect a person to whom a duty of confidence is owed, but it seems to us that it is difficult to justify a statutory right of action for the misuse of information in breach of confidence where the misuse does not cause damage falling within any of the categories. Information which is the subject of a breach of confidence action will normally be truthful information and we take it to be a cardinal principle of any democratic society that restrictions should not be imposed on the publication of the truth except to the extent that they are necessary in order to protect individuals or society as a whole from a real likelihood of damage. We also recognise that these categories are not necessarily exclusive of one another and that the same breach of duty could fall under more than one of them. However, we believe that in practice this will not cause any serious difficulties.

65. We think it important to emphasise the difference between an action for breach of confidence falling within Category II or III and an action for defamation. An action for defamation lies in respect of the publication of information which is untrue where the publication results in the lowering of the reputation of the plaintiff in the view of right-thinking members of society. An action for breach of confidence concerns information which may be true; the plaintiff has a right of action either because the breach of duty has caused him pecuniary loss which the defendant foresaw or ought to have foreseen or because the breach of duty has caused him distress which any reasonable man would have suffered had the information been published about him. Of course, the fact that the publication of information about a plaintiff does in fact lower him in the estimation of right-thinking members of society is a relevant factor to be considered in deciding whether publication of the information would cause distress to a person of average sensitivity and whether the plaintiff has in fact suffered such distress.

66. We would, however, ask whether it is necessary to provide for the circumstances covered by Category II. Our provisional view is that such provision would be desirable, but we recognise that Category II gives a very high degree of protection to information obtained in breach of confidence. It may be relevant to point out in this connection that where the factor of breach of confidence is not present, even an untruthful statement which is not defamatory, is not actionable unless malicious¹⁰⁴. This is an issue on which we would particularly welcome views.

67. Our formulation of Category III contemplates that an action would only lie for injury to feelings where the breach of confidence causes distress to the person to whom the duty of confidence is owed. It is arguable that the concept of distress is too restrictive and that, on the analogy of several of the draft Privacy Bills considered by the Younger Committee¹⁰⁵, an action should also lie where the breach of confidence causes annoyance or embarrassment which falls short of actual distress. We would be grateful for expressions of opinion on this point, but our provisional inclination is to favour the more restrictive concept.

68. We would lay particular emphasis on the different categories of the new tort because their determination appears to us to be a necessary preliminary to any detailed consideration of the principles which should govern breach of confidence. In some cases a common principle would clearly be appropriate whereas in others the development of separate principles for the

104. See Salmond on the Law of Torts (16th ed., 1973) p. 407 with regard to "Injurious Falsehoods".

105. See e.g. clause 4(2)(b) of both Mr. Walden's Bill and the draft "Justice" Bill. The texts of the Bills are set out in Appendix F to the Report of the Committee on Privacy, 1972 Cmd. 5012.

different categories would appear to be justified; we indicate in the following paragraphs of this Part of the Working Paper the cases in which we consider that separate treatment is called for. However, discussion of the preliminary question of the categories of the tort also indicates some of the broad lines on which we envisage breach of confidence developing and we would be grateful for comments on the general approach we have adopted.

THE PERSONS ON WHOM A DUTY OF CONFIDENCE SHOULD BE IMPOSED

69. The question of who should be subject to a duty of confidence is closely bound up with the related questions of what circumstances should give rise to the duty and in whose favour the duty should operate. Nevertheless, it seems clear that the duty cannot be imposed on a person unless he is actually in possession of information and accordingly we develop our further proposals on the basis that the duty of confidence would be owed by the possessor of information to which the duty relates.

THE CIRCUMSTANCES IN WHICH A DUTY OF CONFIDENCE SHOULD ARISE

70. Our provisional view is that there are three situations in which the possessor of information (being information within the categories defined in paragraph 63 above) should owe a duty of confidence. These situations can most conveniently be described in the form of the following propositions:

- (i) A possessor of information should owe a duty of confidence in respect of that information if it was given to him by another person on the understanding, which the possessor expressly or impliedly accepted, that confidence would be observed in regard to it.

- (ii) A possessor of information should owe a duty of confidence in respect of that information if it was acquired by him for another person or on another person's behalf on the understanding with that other person, which the possessor expressly or impliedly accepted, that confidence would be observed in regard to it.
- (iii) A possessor of information should owe a duty of confidence in respect of that information if he knows, or ought to know, that the information has reached him, directly or indirectly, through another person who was subject to a duty of confidence in respect of it.

71. The first proposition would cover situations where one person tells another something in confidence and the recipient's agreement to observe confidentiality is either expressly signified or can clearly be implied from the nature of the relationship between the parties. Thus, where a patient discloses his medical history to his doctor, a client gives his legal adviser the details of his case or an employer allows his employee access to the files of his business, the nature of the confidential relationship would imply an agreement on the part of the recipient to observe confidentiality. The second proposition would cover situations where a person acting on behalf of another acquires information for him rather than from him. Thus, a doctor would owe a duty of confidence in respect of information concerning his patient's health obtained for his patient from a specialist; a consultant who undertakes research on behalf of a client would owe a duty of confidence in respect of information acquired in the course of carrying out the research; and an employee who obtains information in the course of his employment would owe a duty of confidence in respect of that information.

72. The adoption of the first two propositions would refine the existing law in one significant respect. Under the test propounded by Megarry J. in Coco v. A.N. Clark (Engineers) Ltd.¹⁰⁶, it is sufficient for the plaintiff to establish that the defendant should have realised that the information was being given to him in confidence; in contrast, our propositions would make it necessary for the plaintiff to go further and show that the defendant, either expressly or by implication, accepted an obligation to treat the information as confidential. The distinction is chiefly of importance in relation to what may be called "the unsolicited confidence", that is, the case where a person imparts information to another (not in any confidential relationship with him) with a request that the information be treated confidentially but in circumstances in which the other is given no real opportunity to decide whether he is willing to accept it on that basis or not. Sometimes it seems right that the unsolicited confidence should be protected. Thus, if an inventor sends a letter marked "confidential" to a public company giving the details of an idea for a new manufacturing process which he hopes to interest the company in buying, it is certainly arguable that the company should be bound to honour his request that confidence should be observed and that the idea should not be used or disclosed to others without his consent, or at any rate without payment. But although most people would probably regard the company as being under a moral obligation in these circumstances to observe confidence, we do not believe that it would be right to impose a legal duty of confidence on the company. As a matter of general principle a person is not expected to take on the obligations of a trustee unless he is willing to do so and it seems to us that someone who discloses his secrets to strangers without allowing them the opportunity to accept or reject them must take the risk that they will not behave as he would like them to. However, we would welcome comments on this point.

106. [1969] R.P.C. 41, 47-48.

73. The third proposition would cover situations involving a person who was not a party to the original confidence. Problems relating to breach of confidence are not confined to cases where the alleged breach is by someone who himself obtained the information from the person who originally imposed a requirement of confidence. Frequently, as in the Saltman case¹⁰⁷, the possessor of information is simply the last link in a chain of informants stretching back to the first informant. The chain may be a legitimate one, in which each informant has passed the information on to the next in continuation of the confidence as he is authorised to do; or it may be an illegitimate one, in which confidence has been broken by one or more of the informants, or perhaps by each of them. Where the possessor of information is at the end of a chain of informants, our provisional view is that he should owe a duty of confidence in respect of that information if he knows, or ought to know, that in the course of its transmission down the chain it was the subject of a duty of confidence which still subsists. We consider the question of the knowledge of the possessor of information in this situation in greater detail later¹⁰⁸.

THE PERSONS TO WHOM THE DUTY OF CONFIDENCE
SHOULD BE OWED

74. To whom should the duty of confidence be owed? This question is clearly dependent primarily on the circumstances in which the duty arose. If our propositions¹⁰⁹ regarding these circumstances are accepted, it follows that in our provisional view -

- (a) a duty of confidence imposed in the circumstances described in proposition (i) above should be owed to the person by whom the information was given;

107. Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd. (1948) 65 R.P.C. 203; [1963] 3 All E.R. 413.

108. See paras. 76-80 below.

109. See para. 70 above.

- (b) a duty of confidence imposed in the circumstances described in proposition (ii) above should be owed to the person for whom or on whose behalf the information was obtained;
- (c) a duty of confidence imposed in the circumstances described in proposition (iii) above should be owed to any person in the chain of transmission who has imposed a duty of confidence in respect of the information.

75. There is, however, a question as to whether, when a duty of confidence in respect of particular information is imposed, a breach of the duty should be separately actionable at the suit of the person to whom that information relates. Under our propositions, such a person would already have a right of action if, say, he imparted information about himself to another in confidence and the confidence was broken. But should he have a right of action if the information about himself was not imparted by him at all but was legitimately acquired by others who, having agreed to observe confidence in regard to it, subsequently broke that confidence? To take a specific example, suppose that a newspaper commissioned a journalist to write a candid assessment of a man's life on the understanding that it would be kept confidential until after the man's death and that the journalist furnished an article to the newspaper exposing details of the man's life which were true but likely to cause him distress, or even pecuniary loss; if the article was in fact published by the newspaper before the man's death in breach of their duty of confidence to the journalist, should the man also have a right of action against the newspaper based on their breach of confidence? It is arguable that in this situation the wrong to the man is far greater than that to the journalist and that he should be entitled to recover damages accordingly. Our provisional view is, however, that it would be inappropriate to

give the man a right of action based on breach of confidence. Although there was an antecedent confidential situation, it was not a situation to which the man was a party; and it is very difficult to treat him as having been a party to the situation, even by a fiction, since the whole arrangement was designed to prevent him, of all people, from knowing about the article. Furthermore, the article might just as well have been written and published without any antecedent confidential situation, and if it had been, no question of the man having a right of action for breach of confidence could conceivably have arisen. The truth seems to us to be that the man has a complaint not because his confidence has been abused but because his privacy has been infringed and that to admit an action by him for breach of confidence would amount to using the law of confidence merely as a peg on which to hang a right of privacy in his favour. We would, however, welcome views on this issue.

THE REQUIREMENT OF KNOWLEDGE

76. We should make it clear that we are not at this point concerned with the question whether a person, who has acquired information for value in circumstances in which he neither knew nor ought to have known that it was the subject of a duty of confidence, and who subsequently becomes, or ought to have become, aware that this information reached him through a breach of confidence, should nevertheless be free to use that information. We deal with this question in our consideration of the defences to an action for breach of confidence¹¹⁰. We are in the immediately succeeding paragraphs concerned with the question whether a person in possession of information should be under any liability in respect of a period when he neither knew nor ought to have known that it was subject to a duty of confidence.

110. See paras. 83-86 below.

77. In discussing our third proposition regarding the circumstances in which a duty of confidence should arise, we put forward the view¹¹¹ that a possessor of information should only owe a duty of confidence to the indirect source of his information if he knows, or ought to know, that his information was obtained from that source and that it was the subject of a duty of confidence. In general, it seems clearly right that a person should not be liable in tort in respect of any period when he had no knowledge that information in his possession was subject to a duty of confidence. But it is also arguable that where the possessor has in fact exploited another's information to his own considerable profit, even if he has done so in all innocence, it is wrong that the injured party should be unable to claim any restitution whatever.

78. The position of the innocent user of another's information has obvious analogies with that of the innocent user of other forms of intellectual property and accordingly we have turned to the laws governing patents, trade marks and copyright for guidance. The position of the innocent user under those laws can be summarised as follows:

- (a) In the case of patents, damages are not recoverable against a defendant who proves that at the date of the infringement he was not aware, and had no reasonable ground for supposing, that the patent existed; and the application to an article of the word "patent" or "patented" does not raise any inference of knowledge unless it is accompanied by the number of the patent¹¹². Since 1949¹¹³ a plaintiff has had the right to claim an account of profits in

111. See para. 73 above.

112. Patents Act 1949, s. 59(1).

113. The right to claim an account of profits was abolished in 1919 but restored by the Patents Act 1949, s. 60.

lieu of damages, but it is an open question whether an account of profits can be granted against a defendant who would not be liable in damages¹¹⁴. An innocent infringer may, therefore, be under no liability whatever to make restitution.

- (b) In the case of trade marks, knowledge or lack of knowledge does not affect the right to damages; but an account of profits is not normally granted in respect of a period when the defendant had no knowledge of the plaintiff's mark¹¹⁵. An innocent infringer is therefore liable to damages but not to account for his profits.
- (c) In the case of copyright, the position is more complex and it is necessary to distinguish between direct infringements¹¹⁶ (which refer broadly to reproducing the work in a material form, publishing it, performing it in public or broadcasting it) and indirect infringements¹¹⁷ (that is, infringements by importation, sale and other dealings). As far as direct infringements are concerned, the plaintiff is not entitled to damages but is entitled to an account of profits if at the time of the infringement the defendant was not aware, and had no reasonable grounds for suspecting, that copyright subsisted in the work¹¹⁸.

114. Terrell on the Law of Patents, (12th ed., 1971) para. 958.

115. Kerly's Law of Trade Marks and Trade Names, (10th ed., 1972) para. 15-78.

116. Copyright Act 1956, s. 2(5).

117. Ibid., s. 5.

118. Ibid., s. 17(2).

As far as indirect infringements are concerned, absence of knowledge relieves the infringer of all liability for infringement¹¹⁹. The overall position appears to be that an innocent infringer is never liable to damages, even for conversion¹²⁰, but is liable to account for any profits he has gained from a direct infringement.

79. As the above summary indicates, a plaintiff can in some circumstances obtain restitution for the innocent use of other forms of intellectual property by way of damages or an account of profits. But there is no uniform rule and the contrast between the patent and trade mark provisions is particularly striking: innocent use of a patent never attracts damages though it may give the plaintiff a right to claim profits, whereas innocent use of a trade mark gives the plaintiff the right to claim damages but not profits. There is therefore no possibility of applying a general rule governing the innocent use of intellectual property to the use of information in breach of confidence.

80. Our provisional view is that neither damages nor an account of profits¹²¹ are a satisfactory means for effecting restitution for the innocent use of information in breach of confidence. The real problem in an action which turns on innocent user is that both parties to the action are innocent and it is not apparent why one should be compensated at the expense of the other. At most, there would seem to be a case for apportioning such profits as have actually been made

119. Ibid., s. 5 and see Copinger and Skone James on Copyright, (11th ed., 1971) para. 471.

120. Ibid., s. 18(2). But in an action for conversion or detention under s. 18, the burden of proof is on the defendant to establish innocence: see W.E.A. Records Ltd. v. Benson King (Sales) Ltd. [1974] 3 All E.R. 81.

121. An account of profits may result in a defendant paying more than he would have been liable to pay under an award of damages. See e.g. Copinger and Skone James, op. cit., para. 573.

between the two innocent parties. But we doubt whether even this solution could often be justified in practice, having regard to the difficulty and expense involved in working out an account of profits¹²². Bearing in mind also the undesirability in principle of restricting the publication of truthful information except in so far as it is essential to do so, we believe that we would not be justified in recommending any remedy for innocent use. Accordingly, our provisional view is that knowledge or constructive knowledge on the part of the possessor of information regarding the circumstances giving rise to a duty of confidence to the indirect source of his information should be an essential pre-requisite to the imposition of liability on him.

WHAT THE DUTY OF CONFIDENCE SHOULD BE

81. Earlier in this Working Paper¹²³, in discussing the duty of a person under an obligation of confidence, we came to the conclusion that under the existing law the duty may exist in one of two forms: namely, a broad form, in which the duty is to refrain from using or disclosing information without the consent of the person to whom the obligation is owed, and a less stringent form, in which the duty is simply one of not using or disclosing the information without paying for it. In the light of the proposals we are making, we see no necessity to embody alternative forms of duty in the new tort we propose. There is certainly a need for the law to enable different principles to be applied and different remedies to be granted where misuse of the information involved is, on the one hand, likely to cause the plaintiff distress or is, on the other hand, only likely to deprive him of a pecuniary advantage; and no doubt it is for this reason that judges have been led to consider the possibility of two quite different duties existing. In our view, however, this need can adequately be met without recourse

122. See para. 123 below.

123. See paras. 25-26 above.

to any concept of alternative duties. We therefore provisionally propose that for the purposes of the new tort only one duty should be recognised and that this should be the duty in its broad form of refraining from using or disclosing information except to the extent that such disclosure or use is authorised by the person to whom the duty is owed.

82. We also discussed earlier¹²⁴ the doubt which exists in the present law regarding the liability of a person under an obligation of confidence where the information in question came to be disclosed or used, not in consequence of a deliberate act on his part, but as a result of his negligence. In principle it seems to us that a person imparting information in confidence should be entitled to expect that the recipient will take reasonable precautions to safeguard the confidentiality of the information, and that if he cannot expect this, the value of the duty of confidence will be seriously impaired. We are reinforced in this view by the consideration that under our proposals a person acquiring information at first hand from or for another will incur no liability to the other in confidence unless he accepts, either expressly or by implication, an obligation to treat it as confidential; such a person is therefore in no way comparable with the involuntary bailee. Our provisional view is, accordingly, that for the purposes of the tort we propose the duty of confidence should be expanded into a duty to take reasonable care to ensure that the information to which the duty relates should not be disclosed or used except to the extent that such disclosure or use is authorised by the person to whom the duty is owed.

124. See para. 27 above.

THE DEFENCES

Acquisition of Information for Value which the Acquirer neither Knows nor ought to Know is Subject to a Duty of Confidence

83. Let us suppose that an inventor gives particulars of his invention to a draughtsman; the latter in breach of confidence sells the information to a manufacturer, who neither knows nor ought to know of the breach of confidence. When the inventor learns that the manufacturer is in possession of the information, he seeks to prevent the manufacturer from using it. Should the manufacturer be free to use the information? We have seen¹²⁵ that in English law this is probably an open question. The American Law Institute's Restatement deals with this matter as follows¹²⁶:

"One who learns another's trade secret from a third person without notice that it is secret and that the third person's disclosure is a breach of his duty to the other, or who learns the secret through a mistake without notice of the secrecy and the mistake,

(a)

(b) is liable to the other for a disclosure or use of the secret after the receipt of such notice, unless prior thereto he has in good faith paid value for the secret or has so changed his position that to subject him to liability would be inequitable".

84. Provisionally we agree with the Restatement approach in so far as it would give a defence to the innocent acquirer of information who has given value for it. It seems to us that, as between him and the person who has entrusted the information to another in confidence, the latter should take the risk of any loss arising from a breach of confidence; the

125. See para. 20 above.

126. Restatement of the Law, Torts (1939), s. 758.

latter has in any event a remedy against the person or persons who were in breach of confidence in respect of the information. We think that this defence should only be applicable where the plaintiff has been deprived of the opportunity of exploiting information to his pecuniary advantage, that is, in cases of breach of confidence falling within Category I¹²⁷.

85. Provisionally we do not favour the approach adopted by the Restatement in so far as it would give a defence to the innocent acquirer of information who has not given value for it, but who "has so changed his position that to subject him to liability would be inequitable". In such a case the innocent acquirer has obtained a gratuitous benefit and it does not seem to us "inequitable" that he should be under some liability in respect of his use of the information after he has learned of the breach of confidence. This does not mean that he will necessarily lose what he may have spent in exploiting, or preparing to exploit, the information, as he may under certain conditions be allowed by the court to continue to use the information subject to payment to the person to whom the duty of confidence is owed. This is a matter, however, which is more conveniently dealt with when we consider the circumstances in which the court may refuse an injunction to a person to whom a duty of confidence is owed¹²⁸.

86. We appreciate that paragraphs 83 to 85 above raise controversial issues and we would particularly welcome comments on the provisional conclusions which we have reached.

127. See para. 63 above.

128. See paras. 115-118 below.

Lawful Authority

87. It is clear to us that a defendant should be released from a statutory duty of confidence imposed upon him in respect of information to the extent that he is under a legal duty to disclose that information. Such a legal duty may arise by or under a particular statutory provision, such as a provision of the Companies Act requiring the disclosure of particular transactions or a provision of the Road Traffic Act enabling a police officer to demand the answer to a particular question¹²⁹. It may also arise from the inherent jurisdiction of the court (except where a specific privilege exists) to require the giving of evidence or the production of documents with respect to information acquired in confidence. In these cases the defence of lawful authority which we propose would do no more than accord recognition to the present position.

88. A more difficult problem arises where a defendant's duty to refrain from disclosing confidential information conflicts with his contractual duty to disclose it to a particular person, such as his employer. A practical illustration of the problem would be where a doctor or a psychologist employed in industry is faced with a demand by his employer for the disclosure of medical records relating to other employees of the firm who have frankly discussed their personal problems with him on a confidential basis and without any express or implied understanding that the information would be

129. See e.g. Hunter v. Mann [1974] 2 W.L.R. 742 where a police officer, acting under section 168(2)(b) of the Road Traffic Act 1972, asked a doctor to furnish information in his possession which might have led to identification of the driver of a stolen car who was alleged to be guilty of dangerous driving. The doctor's claim that he was entitled to withhold the information on the grounds that it was the subject of a professional confidence was not upheld.

made available to the employer¹³⁰. Assuming that no question of the public interest is involved (as it would be, for instance, if the health or safety of other employees was at stake) should the doctor or psychologist be released from his duty of confidence on the ground that it conflicts with his contractual obligation? Our provisional view is that it would be wrong to widen the defence of lawful authority to this extent; we doubt whether it is reasonable to expect a person confiding information to another on a confidential basis to enter into an inquiry as to the contractual position of the other and it seems to us that the availability of such a defence could seriously weaken the whole basis of the duty of confidence. Furthermore, it appears to us that if our proposal that the duty of confidence should be enforceable in tort is implemented, the dilemma of the employee would in most cases be resolved since the courts would not, on the ordinary rules of contract, enforce a contractual covenant which necessarily involved the commission of a tort. We would, however, welcome comments on this problem.

Privilege

89. The law of defamation recognises that on certain absolutely privileged occasions, such as proceedings in Parliament or judicial proceedings, the need for complete freedom of communication is of such paramount importance to society that it overrides the need to give protection to the individual against defamation; it is therefore a defence to prove that a statement complained of as being defamatory was made on an occasion of absolute privilege, no matter how untrue the statement may be or how malicious the motive of the maker. It seems to us inevitable that a similar defence should be available to an action for breach of confidence. If the law gives protection

130. For a more detailed discussion of the difficulties facing the doctor employed in industry, see the Report of the Committee on Privacy, 1972 Cmd. 5012, paras. 375-6.

on an occasion of absolute privilege to the making of a wholly false and malicious statement, it can hardly be right that it should refuse to give protection to a statement made on the same occasion which is true and made without malice. Our provisional view is, accordingly, that a defence of privilege should be available to the defendant in an action for breach of confidence to the same extent as the defence of absolute privilege would have been available to him if the action had been one for defamation.

90. We do not believe, however, that we would be justified in taking the analogy with defamation a step further and recommending that the defence of privilege we propose should also be available in cases where the defendant would have had a defence of qualified privilege to an action for defamation. In the first place, the defence of qualified privilege in defamation covers a number of different situations and we are not satisfied that all of these afford sufficient justification, in themselves, for a breach of confidence. It is not apparent, for instance, why a defendant to an action for breach of confidence should have a good defence merely because he was protecting or furthering the interests of another, or was protecting his common interest with another. Secondly, the defence of qualified privilege in defamation can only succeed if the defendant is exercising that privilege in good faith; in other words, if he is not actuated by malice. It is, however, of the essence of an action for breach of confidence, as we would formulate it, that the defendant knew, or ought to have known, that the information had been obtained in breach of confidence. The position of a defendant in an action for defamation who can successfully raise the defence of qualified privilege is therefore not strictly analogous to that of a defendant in an action for breach of confidence who, in the nature of the action, must have actual or constructive knowledge of the breach of confidence. This does not mean that the defendant in an action for breach of confidence will not be able successfully to rely on some other defence, for

example, that the information in question has already reached the public domain or that, in any event, it is in the public interest that it should be published.

Public Interest

91. The defence of just cause or excuse was originally founded on the idea that the obligation of confidence was destroyed, or perhaps never arose, if the information to which it related showed "iniquity" on the part of the plaintiff, and iniquity in this sense was for many years regarded as being restricted to crimes and frauds committed by the plaintiff. More recent judgments, though, have widened the scope of the defence to include misconduct of any nature which ought to be revealed in the public interest and the tendency of modern judicial thinking is clearly to emphasise the "public interest" element in the defence rather than the element of "misconduct". We believe that the time has now come when misconduct should be discarded as an element in the foundation of the defence and that the defence should be founded solely on the public interest. In our view, misconduct is no more than a factor which has to be considered, and it is a factor which may not always operate in the same way. It is not necessarily in the public interest, and may well be against it, to disclose confidential information relating to a private wrong, such as the tort of trespass or libel, or which shows that a technical transgression of a bye-law carrying a criminal sanction may have taken place or that the person to whom the duty of confidence is owed was convicted of a criminal offence in a foreign country many years ago. Conversely, there may be an overriding public interest justifying the disclosure of information imparted under a duty of confidence even though the conduct of the person to whom the duty is owed has been legally and morally blameless.

92. Apart from misconduct, which we do not think is a decisive consideration, is it possible to lay down principles as to the factors which the court should take into account in deciding whether the disclosure or use of the information was in the public interest? At first sight, it might seem that the subject matter of the information should relate to a matter of public interest or concern; but almost any subject matter either is, or is capable of being made, an issue of public concern and quite clearly the mere fact that the subject matter of confidence is of public interest should not be sufficient to justify the breaking of the confidence. In Initial Services Ltd. v. Putterill¹³¹, Lord Denning M.R. expressed the view that the disclosure must be made to one who has a proper interest in receiving the information. In the context of that case it is clear that what Lord Denning had in mind was the disclosure of information showing misconduct, but the test is capable of a wider application. Another possibility is that the stage at which the confidence is broken should be a material consideration and that it should be recognised that even if it is in the public interest to reveal that a course of conduct has been, or is about to be adopted, the parties to it should at least be able to discuss in confidence the question of whether they will adopt such a course or not. On this basis it is perhaps arguable that it would be in the public interest to disclose that a public company had taken, or was about to take, a decisive step - such as entering into a contract to remove part of its works elsewhere - which would entail the dismissal of 10,000 men with no other prospects of local employment; but that the public interest could not possibly justify the disclosure of a purely preliminary discussion of the board of directors when the possibility of taking drastic action of this kind to save the company was merely canvassed.

131. [1968] 1 Q.B. 396, 405.

93. We would welcome comments on the question of what considerations, if any, should be laid down to determine the scope of the defence of public interest. The desirability of affording guidance both to courts before which the defence is raised and to those under a duty of confidence (particularly the press) who face a dilemma as to whether it would be in the public interest in particular circumstances to disclose a confidence is self evident. Our provisional view is, however, that the range of circumstances in which the defence might properly be used is so wide and so variable that it is not practicable to define in general terms all the criteria to be used and that it would be misleading to single out particular issues (such as the existence of misconduct) for consideration. There is also a further point, which is perhaps even more important. The public interest is a developing concept which changes with the social attitudes of the times: many things are regarded as being in the public interest today which would not have been so regarded in the last century, or even twenty years ago, and it would be unrealistic to suppose that the concept will not undergo further changes in the years ahead. If this fact is recognised, it seems to us that the only prudent course to follow is to frame the defence in terms which are flexible enough to enable each case to be judged on its individual merits. There is, of course, a substantial public interest in the preservation of confidences and the task of the court considering a defence of public interest would therefore be to balance this against the public interest in disclosing the information to which a confidence related. This is a function which the courts already discharge in other spheres: Norwich Pharmacal Co. v. Customs and Excise Commissioners¹³² and Alfred Crompton Amusement Machines Ltd v. Customs and Excise Commissioners (No. 2)¹³³ are recent examples of cases in which the House of Lords considered the question of where the balance of the public interest lay in relation to a claim for an order of discovery.

132. [1974] A.C. 133.

133. [1974] A.C. 405.

Public Domain

94. It seems clear that an essential element of any meaningful duty of confidence must be that the information to which the duty relates is, at least in some degree, secret; there can be no confidence in something which the whole world knows. It is therefore necessary to consider the extent to which it should be a defence to an action for breach of a statutory duty of confidence that the information concerned is in the public domain. For the purposes of considering this problem we deal separately, on the one hand, with cases in which the plaintiff has been deprived of the opportunity of exploiting information to his pecuniary advantage (Category I of our proposed tort), and on the other hand, with cases where the plaintiff has suffered pecuniary loss or distress through the publication of information relating to himself (Category II or III)¹³⁴. This is an area in which it seems to us that a common principle for all three categories would not necessarily be appropriate.

(a) Breach of Confidence within Category I

95. In the existing law a defence of public domain is well-recognised in relation to a breach of duty which would fall within Category I. The principal authority is the House of Lords decision in O. Mustad & Son v. Dosen¹³⁵. In that case an application for an injunction to restrain the communication of confidential information regarding a process for the manufacture of fish hooks was refused on the ground that the plaintiffs had disclosed the process in a patent specification filed for the purpose of obtaining patent protection; and Lord Buckmaster said¹³⁶:

"...after the disclosure had been made by the plaintiffs to the world, it was impossible for

134. The three categories of the proposed tort are defined in para. 63 above.

135. [1963] R.P.C. 41; [1964] 1 W.L.R. 109. The decision was given in 1928 but not reported until 1963.

136. Ibid., p. 43 (R.P.C.); p. 111 (W.L.R.).

them to get an injunction restraining the defendants from disclosing what was common knowledge. The secret, as a secret, had ceased to exist."

The general principle that information which is public or common knowledge cannot found an obligation of confidence has been restated in more recent cases¹³⁷ and it seems to be accepted that the principle extends to information which is available to the public, even though it may not in fact be generally known¹³⁸. It is true that in another line of cases¹³⁹ the courts have begun to develop the "springboard doctrine" according to which "the possessor of [confidential] information must be placed under a special disability in the field of competition to ensure that he does not get an unfair start"¹⁴⁰ and that this doctrine appears, on the face of it, to weaken the defence of public domain. But no case decided on the springboard principle has yet gone as far as applying it in respect of information wholly in the public domain¹⁴¹; on the contrary, the judgments stress the fact that some element in the information in question was not available to the public¹⁴².

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137. Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd. (1948) 65 R.P.C. 203; [1963] 3 All E.R. 413; Coco v. A. N. Clark (Engineers) Ltd. [1969] R.P.C. 41, 47.
138. Ackroyds (London) Ltd. v. Islington Plastics Ltd. [1962] R.P.C. 97, 104.
139. The principal cases are Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd. [1960] R.P.C. 128; Ackroyds (London) Ltd. v. Islington Plastics Ltd. [1962] R.P.C. 97; Cranleigh Precision Engineering Ltd. v. Bryant [1966] R.P.C. 81; [1965] 1 W.L.R. 1293; and Seager v. Copydex Ltd. [1967] R.P.C. 349; [1967] 1 W.L.R. 923.
140. Per Roxburgh J. in Terrapin's case above. For a fuller quotation see para. 11 above.
141. Unless the Cranleigh case above must be so regarded. But see para. 12 above.
142. See e.g. the remarks of Lord Denning M.R. in Seager v. Copydex Ltd. [1967] R.P.C. 349, 368; [1967] 1 W.L.R. 923, 931.

96. It seems to us that in cases of breach of confidence falling within the category we are now considering, a wide defence of public domain is justified. The defence would recognise the practical realities of modern life; methods of communicating and retrieving information now available make it extraordinarily difficult to prevent the dissemination or use of information which has once found its way into the public domain. It would also accord with the general principle that the dissemination of true information in a democratic society should not be unnecessarily restricted. What should be the test of whether information is in the public domain? Our provisional view is that, in broad terms, information should be treated as being in the public domain if the public have access to it by reason that it has been published generally (that is, not in confidence to a restricted class of persons) or by reason that it has been put on sale to the public or stored in a public archive. We believe that for the purposes of this test it should be irrelevant whether the information is accessible in this country or abroad. It follows that where information is of a mixed nature, being only partly within the public domain, so much of the information as is not accessible to the public would continue to be protectable in confidence.

97. We would, however, suggest one qualification of the broad rule formulated above. This is that where individual items of information have been applied or collected in a manner which requires the expenditure of a significant element of labour, skill or money, the resulting application or collection should not be treated as being in the public domain merely because the individual items from which it has been derived or of which it is composed are publicly available. The special position of information which has been applied or collected in a manner which requires the expenditure of substantial resources is already recognised by the existing law¹⁴³

143. See para. 9 above.

and, it seems to us, rightly so. The qualification we suggest would ensure that a manufacturer who commissions the making of expensive working drawings from which his article can be made would not be deprived of the protection of confidence in respect of the drawings simply because, once the article is on sale to the public, anyone else could commission such drawings to be made from the article. Similarly, a person who takes six months to collect information on a particular topic from the Public Record Office would not be deprived of the protection of confidence merely because none of the individual items in his collection can be so protected. But it is in our view essential that in cases such as these the information should qualify for protection only if the element of labour, skill or money involved is significant.

98. Do the principles of the defence of public domain we have proposed require any modification where the information was not in the public domain at the time when a duty of confidence arose but subsequently came into the public domain? This is a complex question and it is helpful in considering it to distinguish the different circumstances in which the information may become publicly accessible. Thus, to frame the question in a rather more specific form, if B owes a duty of confidence in respect of a trade secret to A, what should the effect be on B's position vis-à-vis A if the secret is put into the public domain in the following cases, namely -

- (i) by A, that is, the person to whom the duty is owed, or by anyone acting on A's authority;
- (ii) by an outside party, that is, a person who discovers the secret by independent research or by means which involve no actionable breach of A's confidence;

- (iii) by C, that is, a person who is also subject to a duty of confidence to A, and whose act in putting the secret into the public domain is in breach of his duty to A;
- (iv) by B himself putting the secret into the public domain in breach of his duty to A?

For the purpose of discussing this question, it is necessary to bear in mind that a disclosure of secret information to others, even if it is done in breach of a duty of confidence, would not necessarily amount to putting the information into the public domain; and that if the effect of the disclosure is not, in fact, to put the information into the public domain, it would remain protectable in confidence as information subject to a duty of confidence. It is also necessary to bear in mind that when previously secret information is brought into the public domain, it may still be possible to protect it by other means, such as an action for breach of contract or an action for infringement of patent or copyright.

99. As a matter of confidence, cases (i) and (ii) above appear to raise no particular difficulties. The information has reached the public domain without any breach of confidence and it seems plain that B should be released from any duty he previously owed to A and should be able to do anything which he could have done if he had never been subject to a duty of confidence to A. Case (iii) is more difficult. At first sight, it seems wrong in principle that B should be able to rely on C's wrongful act to release himself from his duty to A; and it is arguable that, on the analogy of section 49(3) of the Copyright Act 1956, no account should be taken of any unauthorised publication in determining A's rights against B. We believe, however, that it would be unrealistic to incorporate a provision in these terms in the

law of confidence. In confidence, unlike copyright, secrecy is of the essence and once the secret information becomes generally known or is publicly accessible the main justification for using confidence as a cause of action disappears. If this were not so, it would mean that the whole world apart from B and C was entitled to use and disclose the formerly secret information; and bearing in mind that B has kept faith with A until the ending of secrecy there does not seem to us to be adequate justification (at least in the absence of special contractual considerations) for requiring B to continue to be bound by what has become, in effect, an obsolete duty.

100. Case (iv) gives rise to a similar dilemma, but in more acute form. Here B has himself put the secret information wrongfully into the public domain before he can be stopped by injunction. Clearly he should be liable in damages to A for doing so. But, having paid his damages, should he now be entitled as of right to use the information legitimately although his right to do so is, in effect, founded on his own tort, or should it be possible to enjoin him from making further use of it, perhaps in perpetuity? There appears to be no decision in English law which exactly covers this point, but the problem has been much canvassed in the American courts and their decisions reveal an interesting divergence of judicial opinion. Some courts follow "the rule in *Shellmar*"¹⁴⁴ under which a defendant can be enjoined in perpetuity from using what he has once misused; the philosophy underlying the rule appears to be, first, that the plaintiff has an accrued action for breach of confidence against the defendant of which he should not be deprived because the defendant has chosen to put the information into the public domain, and secondly, that the defendant cannot

144. The rule is derived from the decision in *Shellmar Products Co. v. Allen-Qualley Co.* (1936) 87 F. 2d 104.

be heard to say that information initially obtained in confidence has later been "re-discovered" by recourse to public sources. Other American courts, however, follow "the Conmar rule"¹⁴⁵ under which a defendant who has misused information may nevertheless use it legitimately once it has passed into the public domain. Our own view is that, on balance, the Conmar approach is preferable. It does not seem to us realistic to enjoin a defendant from the use of information which is freely available to everyone else, even if its availability is the direct result of the defendant's wrongful act. We believe that the proper remedy against such a defendant is damages and that the amount of the damages awarded should take into account the fact that the defendant's wrongful act has placed the information in the public domain and thereby rendered it unprotectable in future. If the plaintiff is fully compensated for the defendant's wrongful act in placing his information in the public domain, we can see no reason why he should, in addition, be able to obtain an injunction preventing the defendant from using the information thereafter.

101. Our provisional conclusion, therefore, in regard to the type of action we are now considering is that the defence of public domain should be available not only where the information concerned has never been secret but also where it has lost its secrecy after a duty of confidence has arisen. We would, however, welcome comments on the defence of public domain and we would be particularly grateful to hear of any practical problems which may arise in the commercial sphere if our approach is adopted.

145. This rule is derived from the decision in Conmar Products Corp. v. Universal Slide Fastener Co. (1949) 172 F. 2d 150. The American cases based on this rule, or on the rule in Shellmar, are discussed in Turner, The Law of Trade Secrets (1962) pp. 427-458.

(b) Breach of Confidence within Category II or III

102. We have considerable doubts as to whether the principles of the defence of public domain discussed in the foregoing paragraphs are appropriate to a case of breach of confidence falling within Category II or III¹⁴⁶. Much information which is technically available to the public is not generally known and may in fact be known only to a handful of people. For example, the back files of a local newspaper may, if properly and assiduously searched, yield a good deal of information not generally known about a person who spent his early life in the area - his family and educational background, his business connections, his political beliefs and his personal and social problems. Perhaps they show that he was at the centre of an unfortunate affair at his school, that he attempted to take his own life, that he took part in a political demonstration in favour of an unpopular cause, that he associated in his business or private life with someone later convicted of grave crimes against society or even that he "helped the police" with their inquiries into an offence with which he was never charged. These facts will, of course, be known to and remembered by those who were directly involved, but if the publication took place a long time ago it is quite possible that nobody now knows or remembers them solely by reason of the publication in the local newspaper. If the person concerned subsequently discloses any of these facts in confidence to another in the course of a relationship in which absolute frankness is essential, is it right that the person who accepts the confidence should be able, solely on the ground that the facts are technically accessible to the public, to disclose them to others in breach of his duty of confidence? In this type of situation it seems to us to be at least a tenable view that a wide defence of public domain would not be appropriate. For this reason we now put forward for consideration an alternative,

146. See para. 63 above.

and possibly more satisfactory, approach to the problem of public domain in the context of a breach of confidence falling within Category II or III¹⁴⁷.

103. This approach would recognise that there can be no restrictions on the dissemination of truthful information which the law requires to be available to the public. We would therefore propose that where the misuse of information relating to the plaintiff is the subject of a duty of confidence and causes him either pecuniary damage or distress, it should be a defence to an action for breach of the duty to prove that -

- (i) the information can be ascertained by recourse to any register kept in pursuance of any Act of Parliament which is open to inspection by the public or to any other document which is required by the law of any part of the United Kingdom to be open to inspection by the public; or
- (ii) the information was disclosed in the course of any proceedings, judicial or otherwise, which the public were by the law of any part of the United Kingdom entitled to attend.

104. Apart from cases where a positive right of access to the information is given by law, the approach we suggest would envisage no defence of public domain as such. Instead, there would be a statutory provision requiring the court before which the action is heard, in determining the remedy, if any, which should be granted to the plaintiff, to take into account the extent to which the information which has

147. Ibid.

been misused was generally known or was readily accessible to the public. Thus if, for example, a speaker at a public meeting frankly told his audience that information in his speech which was likely to cause distress to his former colleague was being given to them in breach of confidence, the court would not be precluded from granting a remedy against others who repeated the information solely because it had been given in public: if the meeting had in fact been attended by only ten people, the court could award damages against anyone responsible, say, for disseminating the information nationwide or grant an injunction to prevent this happening. On the other hand, if the information in question had recently been widely disseminated, perhaps by being broadcast on the national television channels, an injunction against further publication would not be appropriate nor would the further publication attract damages. Where further publication did attract damages, the amount of the damages awarded against the person responsible for the further publication would reflect the additional injury caused to the plaintiff by the further publication and not the injury caused to him by the breach of confidence as a whole; but the additional injury would, of course, be considerable where information which had previously been protectable in confidence because it was known only to a small number of persons ceased to be so protectable owing to the wide extent of the further publication.

105. We appreciate that on this approach, dependent as it is on the decision of the court, there will inevitably be occasions when third parties, in particular the news media, will be uncertain as to the extent of their right to publish information which has already been given a measure of publication. But if the rights of those to whom a duty of confidence is owed are to be adequately protected, it may be that this is a price that has to be paid. We would welcome comments on the alternative approach we have put forward for consideration and suggestions as to other possible solutions to the problem.

Skill, Experience and Ability

106. It is a well-recognised principle of the law of contract that it is against public policy to prevent an employee from making use of the ordinary skills, experience or abilities which he has acquired in the course of his employment. In breach of confidence the main significance of the principle lies in its effect on other employers to whom the employee may make his skills available after he has left the employment in which they were acquired.

107. It is clear to us that the action for breach of a statutory duty of confidence should not become an instrument whereby an ex-employer is afforded the opportunity - denied to him by the law of contract - of preventing his former employee from making use of his acquired skills. Equally, it should not enable the ex-employer to prevent any other person who may engage the former employee from taking the benefit of the acquired skills. We therefore provisionally propose that it should be a defence to an action for breach of the statutory duty that the information to which the action relates, being information acquired in the course of employment, can fairly be regarded¹⁴⁸ as representing an addition to the personal skill, experience or ability of the acquirer.

108. If this defence is available in respect of information acquired in the course of employment, there seems to be no reason in principle why it should not also be available where the information has been acquired by an independent contractor in the course of carrying out work for another. A consultant on business management, for example, may during the course of a lengthy assignment on behalf of his client add to his

148. See Cross J.'s reasoning in Printers & Finishers Ltd v. Holloway [1965] R.P.C. 239, 255-6; [1965] 1 W.L.R.1, 5 cited in para. 24 above.

personal skill, experience and ability in exactly the same way as an actual employee of the client. Our provisional view is, therefore, that the defence should be extended to cover situations of this nature. The defence in its extended form would accordingly be that the information to which the action relates, being information acquired in the course of carrying out work for or on behalf of another, can fairly be regarded as representing an addition to the personal skill, experience or ability of the acquirer. This defence would, of course, only be relevant in the case of a breach of confidence falling within Category I¹⁴⁹.

Lack of Good Faith on the part of the Plaintiff

109. Earlier in this Working Paper¹⁵⁰, in discussing the problems of the existing law, we referred to the paradox that the best way to protect information may be to reveal it voluntarily in confidence to the very person from whom protection is desired; and we pointed out the far reaching effects of this and the danger that exists of the action for breach of confidence being misused, particularly in order to protect information which is patentable and which would, if patented, become subject to the safeguards against monopolies provided by the patent laws. With these considerations, among others, in mind, we have suggested¹⁵¹ that an original duty of confidence should not arise unless the understanding that confidence would be observed in regard to the information was expressly or impliedly accepted by the recipient.

110. The requirement of acceptance we have suggested will go some way towards resolving the difficulties. But the problems of misuse remain in a case where a person has succeeded

149. See para. 63 above.

150. See paras. 50-53 above.

151. See para. 72 above.

in establishing a confidential business relationship with another. He may use the relationship, not for the genuine purpose of exploring the possibilities of a joint venture to exploit his ideas, but simply as a convenient means of ensuring protection for information that he fears the other will sooner or later discover for himself by independent means; and in a highly specialised field he may thereby acquire a more effective monopoly on the information than he could have obtained by taking out a patent. We do not believe that this is a legitimate use of the protection afforded by law to confidential communications. In the first place, it seems to us that, in the context of confidence, there is something fundamentally wrong with a rule of law which enables a person to protect his secret from another by disclosing it to him. Secondly, we think that the use of the law of confidence as a permanent method of protecting an idea which is patentable is wrong in principle and should be discouraged. The patent laws, which have developed over several centuries, already provide a sophisticated system for the protection of patentable ideas with due regard to the interests of the general public and we would regard the growth of a dual system for the protection of those ideas as an unfortunate development.

111. It does not seem to us that it is an adequate answer to the problems to say that it is always open to the recipient to refuse to enter into confidential relationships or to accept information on a confidential basis. He may have no reasonable grounds for believing that his informant is not acting in good faith; and a general policy of not entering into confidential relationships in the commercial sphere would, to say the least, seriously inhibit the course of business and the interchange of information which is vital in an industrial society. Nor do we think that it is practicable to refuse protection in confidence to information simply because it happens to be patentable; the idea may need further development which is only possible by discussing it with others and it is essential that the originator

of the idea should be able to do this without fear that his trust will not be respected.

112. Our provisional view is that these points can best be met by making it a defence to an action for a breach of confidence falling within Category I¹⁵² that the information concerned was not imparted in good faith; and that lack of good faith would be established if it could be shown that the sole or predominant motive of the plaintiff in imparting the information was to prevent the defendant from using it. We would be grateful for comments on this suggestion, but we hope that consultation on this matter will also be helpful in the following respects:

- (i) in enabling us to reach a view on the scale and importance of the misuse of the action for breach of confidence, both at the present time and in the event of a statutory basis, along the lines we propose, being given to the action;
- (ii) if the misuse is considered of actual or potential importance, in helping us to decide whether it would be sufficient to recommend reliance on the power of the court to exercise its discretion in the grant or refusal of remedies and on the defence of public interest. Thus it may be thought that, in the exercise of its discretion, the court might properly refuse to grant an injunction to a plaintiff who had shown bad faith in communicating information to the defendant in confidence for the sole purpose of preventing him from using it. Similarly, it may be thought

152. See para. 63 above.

that the defence of public interest would enable the court in a proper case to refuse protection to a plaintiff who has acquired a virtual monopoly of a particular piece of know-how and who is contemplating that for an indefinite period it should be exploited neither by himself nor by anyone else.

THE REMEDIES

Range of Remedies

113. We deal with remedies attaching to our proposed new tort of breach of confidence in the following way:

- (1) An injunction. Under this heading we consider, first, interlocutory injunctions, and secondly, the circumstances in which it may be permissible for a court to refuse an injunction if the defendant is prepared to make an appropriate payment to the plaintiff. In the latter connection we make the suggestion that the court should have power to make a "proprietary order" which might provide a flexible and convenient means of clarifying the prospective positions of the plaintiff and the defendant.
- (2) Damages.
- (3) An account of profits.
- (4) An order for destruction or delivery up.

Injunctions

(a) Interlocutory Injunctions

114. Should an interlocutory injunction be granted against a defendant who intends to raise a defence (such as the public interest) which would, if established, completely negative the duty of confidence? In libel cases it has for many years been a settled rule¹⁵³ that the court will not grant an injunction against a defendant who intends to justify the publication of a defamatory article or to raise a defence of fair comment on a matter of public interest; and in Fraser v. Evans¹⁵⁴ the question was raised, but not decided, whether the same rule should apply to breach of confidence on the basis that a plaintiff should not be able to avoid the salutary rule of law in libel by framing his case in breach of confidence. We are not convinced, however, that the same considerations which led to the rule in libel cases are necessarily applicable to breach of confidence. Each case must, it seems to us, be decided on its own particular merits. We would, therefore, adopt the approach to this question laid down by Lord Denning M.R. in Hubbard v. Vosper¹⁵⁵ when he said:

"In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint upon the defendant but leave him free to go ahead The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules."

153. Bonnard v. Perryman [1891] 2 Ch. 269.

154. [1969] 1 Q.B. 349, 362.

155. [1972] 2 Q.B. 84, 96.

(b) Refusal of an Injunction

(i) General

115. The injunction is a discretionary remedy. It may be refused where in the view of the court justice would be adequately done to the plaintiff and undue hardship to the defendant avoided by awarding the plaintiff appropriate compensation. The circumstances to be taken into account by the court in deciding whether an injunction should be refused have been stated by A.L. Smith L.J. in Shelfer v. City of London Electric Lighting Co.¹⁵⁶ in the following terms:

"In my opinion, it may be stated as a good working rule that -

- (1) If the injury to the plaintiff's legal rights is small,
- (2) And is one which is capable of being estimated in money,
- (3) And is one which can be adequately compensated by a small money payment,
- (4) And the case is one in which it would be oppressive to the defendant to grant an injunction:

then damages in substitution for an injunction may be given."

In the case of Shelfer the plaintiffs were asking for an injunction to stop the defendants from continuing to commit a nuisance. However, in Leeds Industrial Co-operative Society Ltd. v. Slack¹⁵⁷, the House of Lords held that in an appropriate case damages might be given in lieu of an injunction even where the injunction was being sought in respect of future tortious activity by the defendants.

156. [1895] 1 Ch. 287, 322-3.

157. [1924] A.C. 851.

- (ii) Compensation to the plaintiff where an injunction is refused in a breach of confidence case.

116. We deal first with the position where either (1) the person against whom an injunction is being sought has acquired the information from the person who is seeking the injunction and has accepted a duty of confidence in respect of that information; or (2) the person against whom the injunction is being sought acquired the information in circumstances in which he knew or ought to have known that it was the subject of a subsisting duty of confidence between other parties. If, in all the circumstances¹⁵⁸, the court considers an injunction should be refused, we would expect the compensation payable to the plaintiff to be the damage which he will suffer if an injunction is refused. The assessment of that damage will vary according to the circumstances. Let us suppose that the plaintiff is to receive compensation for relinquishing all his interest in know-how. In this case the damage he will suffer may depend on whether he had intended to exploit the know-how himself or whether he had intended to dispose of it outright for the best price obtainable. In the former case, his compensation ought to be the capital value of what he might reasonably have expected to make from the exploitation of the know-how in the future. In the latter case, the compensation ought to be the market value of the know-how, which may well be less than what the plaintiff could reasonably have expected to make himself if he already had the plant

158. The court will have regard to the considerations mentioned in para. 115 above but is not, of course, limited to them; for example, the plaintiff may have been guilty of undue delay in applying for an injunction. Conversely, even if the court, having regard to the considerations mentioned by A.L. Smith L.J. would be inclined to refuse an injunction, it may nevertheless grant one in view of the conduct of the defendant. As A.L. Smith L.J. himself pointed out ([1895] 1 Ch. 287, 323) an injunction might be granted where a defendant had deliberately hurried up his breach in the hope that the expenditure in which he was involved might persuade the court to refuse an injunction to the plaintiff.

necessary for exploiting it. On the other hand, if the plaintiff is only to be refused an injunction prohibiting the defendant from exploiting the know-how while retaining certain rights in respect of his own use or disposal of it to others, then the compensation he is to receive will have to be adjusted accordingly.

117. We now turn to the rather different position where the defendant has acquired information without giving value for it in circumstances in which he neither knew nor ought to have known that it was subject to a duty of confidence. If the court decides that in all the circumstances an injunction should be refused, how should the compensation be assessed which has to be paid to the plaintiff? Here we think that the principles laid down in Seager v. Copydex Ltd. (No.2)¹⁵⁹ are apposite, that is to say, the appropriate compensation is either the market value of the information or a royalty (or the capitalised value of a royalty) for the use of the information. If the acquirer of the information, before he knows or ought to have known it was subject to a duty of confidence, has incurred expenditure in exploiting or preparing to exploit the information, his interests will be safeguarded in so far as he will, subject to the proper compensation to the plaintiff, be free to continue to use the information.

118. We think that the principles we have been discussing would be applied by the courts in awarding compensation in lieu of an injunction in respect of the proposed new tort of breach of confidence and that they would normally only be appropriate to cases of breach of confidence falling within Category 1¹⁶⁰ of the new tort. Provisionally, however, we

159. [1969] 1 W.L.R. 809. See e.g. the passage from the judgment of Salmon L.J. cited in para. 35 above.

160. See para. 63 above.

would not favour any attempt to lay down these principles in legislative form or to confine their application to cases falling within that category; but these are matters on which we would particularly welcome comment.

(iii) Proprietary order

119. Where the court refuses to grant an injunction, subject to compensation being paid to the plaintiff, we think it might be convenient if it had the power to make an order (which for the sake of convenience we refer to as a "proprietary order") clarifying the respective positions of the plaintiff and the defendant in regard to future use of the information in issue. We envisage that the order would have the effect of transferring to the defendant all or any of the plaintiff's rights in the information on such monetary terms as were set out in the order. If all the plaintiff's rights were transferred to the defendant, the defendant would, of course, thereafter step into the plaintiff's shoes and be entitled to enforce those rights to the same extent as the plaintiff and even against the plaintiff himself. If only a partial transfer were made it would amount, in effect, to a licence to the defendant to use or disclose the information to the extent specified; the licence could, for instance, specify whether it is to be perpetual or for a limited period, whether it is to be exclusive to the defendant or subject to the right of the plaintiff to use the information himself, or to license other persons to use it. In the case of an order for the partial transfer of the plaintiff's rights, there seems to us to be no reason why the monetary terms of the transfer should not be in the form of periodical payments in the nature of a royalty rather than in the form of a once-for-all capital sum¹⁶¹.

161. Seager v. Copydex Ltd (No. 2) [1969] 1 W.L.R. 809, 814. Salmon L.J. pointed out that damages can only be given once and for all, but it seems to us that there is a valid distinction between damages for loss actually suffered and compensation (admittedly often called "damages") in lieu of an injunction to prevent future loss.

Damages

(a) Breach of Confidence within Category I or II

120. Our provisional view is that any award of damages (other than compensation for loss if an injunction is refused) for a breach of duty falling within Category I or II¹⁶² of the new tort should be limited to the actual pecuniary loss suffered by the plaintiff. The assessment of such damages would be made in accordance with the ordinary principles of the law of damages.

(b) Breach of Confidence within Category III

121. Our provisional view is that damages for a breach of duty falling within Category III¹⁶³ of the new tort should be awarded only for distress actually suffered by the plaintiff in consequence of the breach.

(c) Exemplary or Punitive Damages

122. Should exemplary damages be available to a plaintiff? Following the cases of Rookes v. Barnard¹⁶⁴ and Broome v. Cassell & Co. Ltd.¹⁶⁵, it is plain that the scope for exemplary damages in English law is now very limited and that their award is effectively confined to three classes of case: the first being where there has been oppressive, arbitrary or unconstitutional action by servants of the government, the second being where the defendant's conduct has been calculated to make a profit for himself which might well exceed the compensation payable to the plaintiff, and the third being where the award of such damages is expressly authorised by statute¹⁶⁶. Hardly any examples can now be found of cases in the third

162. See para. 63 above.

163. Ibid.

164. [1964] A.C. 1129.

165. [1972] A.C. 1027.

166. Rookes v. Barnard [1964] A.C. 1129, 1226-7.

class¹⁶⁷ and we believe that it would be anomalous and out of step with the general development of the law of damages if a statute on breach of confidence were now to authorise expressly the award of exemplary damages in general terms; but it is arguable that a plaintiff in an action for breach of a statutory duty of confidence should be able to obtain exemplary damages in cases squarely within the first and second classes discussed in Rookes v. Barnard to the same extent as a plaintiff in any other action in tort. We doubt whether this argument is well-founded. As far as a breach of confidence falling within Category II or III¹⁶⁸ is concerned, we take the view that if the plaintiff is adequately compensated for any pecuniary damage or distress he has suffered - and in a proper case the damages under this head could be very substantial - there is no reason why he should be eligible for a further award by way of exemplary damages. As far as a breach of confidence falling within Category I is concerned, it seems to us that, having regard to the remedy of the account of profits, cases in the second class could not arise and that cases in the first class are more appropriately left to disciplinary regulations or criminal sanctions. Our provisional view is, therefore, that there should be no power to award exemplary damages for breach of the statutory duty of confidence, but we would welcome comments on this question.

Account of Profits

123. In contrast to damages, which seek to compensate the defendant for the loss he has suffered, an account of profits seeks to recover from the defendant the profit he has made. Where both remedies are available, they are always alternative, since if both were granted the plaintiff would receive a double benefit for the same wrong; but as one remedy may be

167. The one definite example is section 13(2) of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951.

168. See para. 63 above.

more beneficial to the plaintiff than the other, it is at the plaintiff's option (subject to the discretion of the court in granting the equitable remedy of an account) which remedy he will take. In practice, though, an account of profits is not generally a very satisfactory remedy as was pointed out as long ago as 1892 by Lindley L.J. in Siddell v. Vickers¹⁶⁹:

"...the difficulty of finding out how much profit is attributable to any one source is extremely great - so great that accounts in that form very seldom result in anything satisfactory to anybody. The litigation is enormous, the expense is great, and the time consumed is out of all proportion to the advantage ultimately attained; so much so that in partnership cases I confess I never knew an account in that form worked out with satisfaction to anybody. I believe in almost every case people get tired of it and get disgusted. Therefore, although the law is that a patentee has a right to elect which course he will take, as a matter of business he would generally be inclined to take an inquiry as to damages, rather than launch upon an inquiry as to profits."

For these reasons, an account of profits is rarely granted in actions for infringement of a patent and we envisage that it would seldom be resorted to in actions for breach of a statutory duty of confidence. But there are, nevertheless, cases in breach of confidence in which the calculation of profits is a relatively straightforward matter and where it is the remedy best fitted to do justice between the parties: an example is Peter Pan Manufacturing Corporation v. Corsets Silhouette Ltd.¹⁷⁰ where the defendants were ordered to account for the profits made by them in selling a particular type of brassière manufactured from designs used in breach of confidence. The availability of the remedy would also act as an effective deterrent to any person contemplating a breach of

169. (1892) 9 R.P.C. 152, 163.

170. [1963] R.P.C. 45, 60; [1964] 1 W.L.R. 96, 108.

confidence who might otherwise calculate that the profits from his breach will exceed any liability he may incur in damages to the person to whom he owes a duty of confidence. Our provisional view is that in a case involving a breach of duty falling within Category I¹⁷¹ the remedy should continue to be available to the court as an alternative to damages.

Order for Destruction or Delivery up

124. We envisage that the court would continue to have jurisdiction, in a proper case, to order the destruction or delivery up of material such as notes, sketches or tapes in which confidential information has been recorded. Such an order would be particularly appropriate where the defendant has flagrantly breached the plaintiff's rights and is enjoined from making any further use or disclosure of the information. It would obviously be inappropriate if the defendant was granted a proprietary order in respect of the information except in so far as the terms of such an order did not cover the information.

A SPECIAL REMEDY AGAINST GROUNDLESS THREATS

125. Under section 65 of the Patents Act 1949 a person who is unjustifiably threatened with proceedings for infringement of a patent can bring an action for relief. By that action he can obtain a declaration that the threats are unjustifiable, an injunction to restrain their continuance and damages, unless the defendant proves that the acts in respect of which proceedings were threatened would constitute an infringement of a patent or of other rights arising under the patent laws. A mere notification of the existence of a

171. See para. 63 above.

patent does not, however, constitute a threat of proceedings within the meaning of the section. In the form which the section earlier took it was said to be aimed at "a patentee who causes damage by disseminating threats which he dare not or will not justify by an action, who is 'willing to wound but yet afraid to strike'"¹⁷².

126. It is for consideration whether a similar statutory right of action should be available to a person who is subjected to groundless threats of proceedings for breach of a statutory duty of confidence, at any rate where the information concerned is of a patentable nature. Threats of this nature are capable of causing grave damage to the business of a person in this position and it is arguable that a procedure should be available to enable him to dispose of them once and for all. As we have earlier pointed out¹⁷³, breach of confidence is now an alternative, and in some respects, a better method of protecting ideas than patent; but there seems to be no reason why in this particular respect a person should be more favourably placed because he has chosen to protect his secret as a matter of confidence rather than by using the more conventional machinery offered by the patent laws.

EFFECT OF DEATH ON CAUSES OF ACTION

127. The effect of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 is that all causes of action, except for defamation, subsisting against or vested in any person on his death survive against or, as the case may be, for the benefit of his estate. If, following any recommendation by the Faulks Committee¹⁷⁴ the exception

172. Day v. Foster (1890) 7 R.P.C. 54, 60.

173. See para. 51 above.

174. The law on defamation is under consideration by the Committee appointed in June 1971 under the chairmanship of Mr. Justice Faulks "to consider whether, in the light of the working of the Defamation Act 1952, any changes are desirable in the law, practice and procedure relating to actions for defamation".

regarding defamation were to be removed, this would much strengthen the case for leaving any actions for breach of confidence to survive as at present against, or for the benefit of, the estate of a deceased person. If, however, the Faulks Committee were to leave defamation in its present position, we think an action for breach of confidence should, in respect of a breach of duty falling within Category III (i.e. for distress suffered) follow the rule applicable to defamation but not in respect of a breach of duty falling within Category I or II of the new tort¹⁷⁵.

EFFECT OF DEATH ON INFORMATION HELD IN CONFIDENCE

128. When a person has imparted information in confidence and has died before any breach of that confidence has taken place, to what extent should the personal representatives or relatives of that person be able to enforce the preservation of that confidence against persons who would have been liable for using or disclosing that information during the lifetime of the deceased? Under the present law of defamation, the relatives of a deceased person do not have a right of action in respect of defamation of the deceased. But we do not think that in this respect defamation and breach of confidence raise analogous problems. Even if it were desirable that there should be some means of controlling untrue aspersions on a deceased person's reputation, it does not follow that true statements made about him should be subject to similar control, if the information they contain was given in confidence by the deceased. Where an action lies for a breach of confidence falling within Category II or III of the new tort¹⁷⁶, it constitutes, in our view, a permissible limitation on the free circulation of true information because it is necessary to protect a living plaintiff in respect of pecuniary

175. The categories of the new tort are defined in para. 63 above.

176. Ibid.

damage or distress which he has suffered. However, we think the position in respect of a breach of confidence falling within Category I, where the interest in the information is of a quasi-proprietorial nature, is quite different. If an inventor has entrusted information relating to his invention to another in confidence and then dies, his personal representatives should have the right to sue for the benefit of his estate any person who after his death discloses or uses that information in breach of the duty of confidence which he would have owed to the inventor had he survived.

JURY TRIALS

129. Under the present practice actions for breach of confidence are tried without a jury. In cases falling within Category I of the new tort¹⁷⁷, the issues involved are likely to be complex, requiring prolonged examination of documents or accounts and scientific investigation which it would be inappropriate to place before a jury. In comparable actions for the protection of intellectual property, such as patents and trade marks, juries are seldom, if ever, used in practice¹⁷⁸. However, cases falling within Category II or III may raise rather different issues. There will be questions whether statements made about a person are reasonably likely to cause him pecuniary damage, whether he knew that such damage would result or whether a man of average sensitivity would have been caused distress by the disclosure of the information. On such questions the assistance of a jury might be valuable. Our provisional view is that there should be no right to have any case involving the new tort of breach

177. Ibid.

178. Under section 84(4) of the Patents Act 1949, an action for infringement of a patent is required to be tried without a jury unless the court otherwise directs.

of confidence tried by a jury, but we think that the court should have power to order a trial by jury where it considers that this would be appropriate.

COUNTY COURT JURISDICTION

130. The county court has general jurisdiction to hear and determine actions founded on contract or tort where the debt, demand or damage claimed is not more than £1,000¹⁷⁹. As the action for breach of confidence which we propose would be founded on tort, the county court would prima facie have jurisdiction to try actions for breach of confidence and to grant injunctions¹⁸⁰, at least where damage has been suffered¹⁸¹, to the extent of its financial limit. Our provisional view is, however, that the power to grant injunctions in respect of breach of confidence should extend to cases where no damage has yet been suffered. We would welcome views on this point.

CONTRACTUAL OBLIGATIONS OF CONFIDENCE

131. We do not envisage that our proposals regarding liability in respect of the breach of a statutory duty of confidence would prejudice any rights or liabilities which a person may have under the law of contract regarding the maintenance of secrecy in respect of information.

179. County Courts Act 1959, s.39; County Courts Jurisdiction Order 1974 (S.I. 1974 No. 1273).

180. County Courts Act 1959, s.74.

181. Ipswich Group Hospital Management Committee v. B.B.C., The Times, 2 March 1972; Arnbridge (Reading) Ltd. v. Hedges, The Times, 17 March 1972.

PART V

PROPOSALS FOR REFORM: DISCLOSURE OR OTHER USE OF INFORMATION UNLAWFULLY OBTAINED

INTRODUCTION

132. Our terms of reference require us "to consider and advise what remedies, if any, should be provided in the law of England and Wales for persons who have suffered loss or damage in consequence of the disclosure or use of information unlawfully obtained and in what circumstances such remedies should be available".

133. This reference has its origin in the concern of the Younger Committee that no civil remedy appeared to afford adequate protection against the misuse of information obtained by unlawful means¹⁸². Earlier in this Working Paper¹⁸³, we considered the question of what protection is afforded by the existing law of breach of confidence to information obtained by a third party by independent means - that is, means which are either lawful or unlawful, but which involve no breach of confidence on the part of any of the original parties to the confidence - and we indicated that there is some doubt as to whether a person owes a duty of confidence in respect of information obtained in this way. The Younger Committee took the view that a civil remedy should be available where the means employed to obtain the information were unlawful and

182. As far as the criminal law is concerned, it is generally accepted (though the point has not apparently been tested) that information is neither tangible nor intangible property and is therefore not capable of being "stolen" for the purpose of the Theft Act 1968.

183. See para. 21 above.

they reported as follows¹⁸⁴:

"We think that the damaging disclosure or other damaging use of information acquired by means of any unlawful act, with knowledge of how it was acquired, is an objectionable practice against which the law should afford protection. We recommend therefore that it should be a civil wrong, actionable at the suit of any person who has suffered damage thereby, to disclose or otherwise use information which the discloser knows, or in all the circumstances ought to have known, was obtained by illegal means. It would be necessary to provide defences to cover situations where the disclosure of the information was in the public interest or was made in privileged circumstances. We envisage that the kinds of remedy available for this civil wrong would be similar to those appropriate to an action for breach of confidence."

POSSIBLE DIFFERENCES BETWEEN AN ACTION FOR BREACH
OF CONFIDENCE AND AN ACTION IN RESPECT OF INFORMATION
UNLAWFULLY OBTAINED

134. In many ways an action in respect of information unlawfully obtained would seem to be similar to one arising by reason of a breach of confidence. It would appear that a person in possession of information should in either case be subject to restriction because there is either a taint on that information when it has been obtained through a breach of confidence or a taint when it has been obtained by unlawful means. Thus in a case which in fact involved a breach of confidence by a solicitor's clerk¹⁸⁵, the court spoke in quite general terms of its power to restrain publication of confidential information "improperly or surreptitiously obtained". However, although it has been suggested that publication of

184. Report of the Committee on Privacy, 1972 Cmnd. 5012, para. 632.

185. Lord Ashburton v. Pape [1913] 2 Ch. 469, 475.

information which has been obtained by "reprehensible means" is, or at least is capable of being, restrained by the courts¹⁸⁶, we agree with the Younger Committee that there should be a definite legal remedy to cover cases of this type. We believe that this remedy should take the form of an action in tort in respect of the disclosure or other use of information unlawfully obtained. In the following paragraphs we consider this tort, in so far as it may involve different requirements from those applying to our proposed tort of breach of confidence.

MEANING OF "INFORMATION UNLAWFULLY OBTAINED"

135. It would seem that the Younger Committee had principally in view the anomaly that, although a person who has received information in confidence can be restrained from publishing it, it is doubtful whether that same person, having stolen the document in which the information was recorded, can be prevented from disclosing it, although of course he will be liable for theft of the document. This would suggest that the definition of "information unlawfully obtained" should at least cover information which has been obtained by means which are prohibited by the criminal law. Thus, if the recommendations of the Younger Committee regarding a new crime of surreptitious surveillance by means of a technical device¹⁸⁷ were to be implemented, it would be possible to restrain the publication of information obtained by, for example, a hidden microphone on the ground that the information had been obtained by criminal means. Similarly, if the tentative suggestions we have made for a criminal offence in respect of obtaining information by

186. Gareth Jones, "Restitution of Benefits Obtained in Breach of Another's Confidence", (1970) 86 L.Q.R. 463, 482.

187. Report of the Committee on Privacy, 1972 Cmnd. 5012, para. 563.

deception¹⁸⁸ were adopted, the publication of information so obtained would be subject to restraint in civil proceedings.

136. It is doubtful, however, whether it would be satisfactory to confine the definition of "information unlawfully obtained" strictly to cases where the information has been obtained by the commission of a criminal offence. For example, A may obtain information by stealing from B (i.e. by permanently depriving him of) a document in which the relevant information is contained; here there is the necessary criminal offence to give rise to the civil action. But it is just as likely that A will not steal the document in the sense of permanently depriving B of it. What interests him is the information, not the document as such. It may well be sufficient for him temporarily to take the document without authority, which may not amount to any criminal offence at all. Yet the desirability of his being prevented from publishing the information in the document is the same, whether he stole the document or took it temporarily in order to extract the information. This suggests that, at least in respect of information which is obtained from a physical object such as a document or a machine incorporating a particular design, the information should be protected from publication if either it has been obtained by the commission of a criminal offence or the object in question has been taken without the authority of the person having custody of it.

137. It is, however, arguable that the concept of information obtained by unlawful means should not be confined to the cases already discussed. Suppose, for example, that an industrial spy trespasses on private premises and makes a copy of a secret document which he sees lying on a draughtsman's desk. He does

188. Working Paper No. 56: Conspiracy to Defraud, paras. 74-77. The proposed offence would make it unnecessary to rely on any element of conspiracy; see R. v. Withers [1974] 2 W.L.R. 26 (C.A.).

not steal or even take the document temporarily; he may not find it necessary to touch the document so that he is not even guilty of a technical trespass to goods. The only unlawful aspect of his conduct is his trespass to land. It may, however, be considered unsatisfactory to restrict publication of information by reference to whether it has been obtained by means of a trespass to land. It is somewhat artificial to link a civil liability in respect of the publication of information to a liability in trespass to which the taker of the information is subject, not vis-à-vis the person from whom the information is taken, but in respect of some third party. If guest A in an hotel enters the room of another guest, B, and obtains information from a document which has been left there he may be a trespasser vis-à-vis the hotel proprietor, but it would be strange if guest B's right to restrain publication of the information so obtained had to depend on the hotel proprietor's right to bring an action of trespass to land against guest A.

138. In view of these difficulties, our tentative view in regard to the meaning to be given to "information unlawfully obtained", so far as restriction on its publication is concerned, is that:

- (a) It should certainly include information obtained by means of a criminal offence. Of course, this category of information is at present of somewhat uncertain scope, until it is known how far new specific criminal offences may be introduced in respect of particular methods of obtaining information;
- (b) It should include the temporary taking without authority of any object from which the information was obtained;
- (c) It is more doubtful whether it should include information obtained by means

of a trespass to land, in view of the wide scope which this would give to the tort of wrongfully publishing information unlawfully obtained¹⁸⁹.

139. As an alternative to the approach outlined in the previous paragraph, it might be desirable to define the concept of "information unlawfully obtained" on broader lines corresponding in spirit to Dr. Gareth Jones's concept of information obtained by "reprehensible means"¹⁹⁰. In itself, however, "reprehensible means" is a somewhat vague concept and it would be necessary to give the courts some indication of the kind of conduct covered. We think the underlying purpose of any remedy in respect of the publication of information "unlawfully obtained" is to protect the holder of the information from its disclosure, where the circumstances are such that having regard to the precautions he has taken he can reasonably expect that the information in his possession will not be obtained by another without his authority, and where the other knows or ought to know that in receiving the information he is defeating the reasonable expectations of the holder of that information. The attraction of this approach is that it avoids some of the arbitrary distinctions and artificialities of the other tests we have discussed, but it inevitably gives a wide scope to the tort of publishing information "unlawfully obtained", the confines of which would only become clear from decisions of the courts.

140. We recognise that it is not easy to arrive at a satisfactory definition of "information unlawfully obtained" for the purpose of restricting publication of such information. On the one hand, to confine the definition to cases where a

189. For example, the reporter who, uninvited, goes to a private wedding reception, would be subject to restraint if he attempted to publish a truthful account of the various states of inebriation of the guests.

190. See fn. 186 above.

crime or a tort has been committed is highly artificial and would exclude situations where its publication should be subject to restriction. On the other hand, the test we have put forward in paragraph 139 above is very wide and may be thought to impose too severe a restriction on the handling of true information. This is an issue on which we would be particularly grateful for advice.

WHO CAN SUE IN RESPECT OF INFORMATION UNLAWFULLY OBTAINED?

141. It seems clear, first, that where information has been unlawfully obtained, the person from whom the information has been obtained should have the right to sue in tort in respect of its misuse. Secondly, we think that where the information is unlawfully obtained from a person who has acquired it on behalf of another person, that other person should also have the right to sue in respect of its misuse. The first of these cases corresponds to the position of the person who is able to sue for breach of confidence if information which he imparted in confidence is misused; the second to the position of the person who is able to sue for breach of confidence where information which has been given in confidence to another on his behalf is misused¹⁹¹.

142. Thirdly, we think that where a person has entrusted information in confidence to another, from whom it is unlawfully obtained (otherwise than by an actual breach of confidence) that person should also be entitled to sue. Thus a patient who has given particulars of himself to his doctor should have the right to prevent publication of this information by a third party who has obtained it by stealing the doctor's files. But should the right to sue be extended further? Thus, to return to an example we have already used in the context of breach of confidence¹⁹², a newspaper collects true but damaging information about a living person which it does not in fact propose

191. See para. 74 above.

192. See para. 75 above.

to publish until his death. The person in question is quite unaware that the newspaper holds this information in its files, which are subsequently stolen by a third party. Should the subject of the information have a right to sue the third party if that party publishes or intends to publish it? On the one hand, it may be said that a person who obtains information by the commission of a crime should run the risk of being liable if publication of the information damages another person, but this argument becomes less persuasive if the concept of unlawfully obtaining information is extended beyond an obtaining by criminal means. On the other hand, it would be strange if there were an action against the person who obtained and published the information although there would have been none against the holder of the information had he himself published it. The right to sue of the person to whom it related would simply depend on the accident that it had been unlawfully obtained and published by another. On balance, we think that such an action would not be defensible unless it were to be given in the wider context of a general right of privacy, but we invite views on this point.

WHO CAN BE SUED IN RESPECT OF INFORMATION UNLAWFULLY OBTAINED?

143. In principle we envisage that the persons who can be sued in respect of information unlawfully obtained should correspond to those who can be sued with regard to information obtained in breach of confidence. The action should therefore lie in respect of the use or disclosure of information against any person who -

- (a) obtained the information by unlawful means;
or
- (b) knows or ought to know that it was so obtained.

THE CATEGORIES OF THE TORT

144. We envisage that the tort of disclosure or other use of information unlawfully obtained would be divided into categories based partly on the nature of the information and partly on the harm which the plaintiff is liable to sustain by the disclosure or use of the information. These categories would be essentially the same as those which we have defined in connection with the proposed new tort of breach of confidence¹⁹³.

DEFENCES, REMEDIES AND OTHER INCIDENTAL MATTERS

145. Once it has been established that an action lies in respect of information unlawfully obtained, we do not think that there should be differences in principle between the defences and remedies applicable to an action in respect of information unlawfully obtained and those which apply to a comparable action for breach of confidence. Nor do we think that in regard to the effect of death on causes of actions, the effect of death on information held in confidence, jury trials and county court jurisdiction, any different approach from that which we have adopted in regard to breach of confidence would be necessary.

146. There is possibly one qualification which should be made to the preceding paragraph. It will be remembered that we have suggested that it should be a complete defence to an action for breach of confidence falling within Category I¹⁹⁴ that the information in question was acquired for value and in circumstances in which the acquirer neither knew nor ought to have known that it was subject to a duty of confidence¹⁹⁵. Should a similar defence be available in the case of information

193. See para. 63 above.

194. Ibid.

195. See paras. 83-84 above.

which has been unlawfully obtained? It can be argued that the position in regard to information unlawfully obtained is not in this context precisely similar to that of information subject to a duty of confidence. As between the person who has the right to bring an action in respect of information unlawfully obtained and the person who has acquired that information in circumstances in which he neither knows nor ought to know that it has been so obtained, the former has not put the secrecy of the information at risk in the same way as a person who imparts information to another under a duty of confidence. We therefore take the provisional view that a person who has acquired information for value in circumstances in which he neither knew nor ought to have known that it had been unlawfully obtained should not have the complete defence which we suggest should be available to the innocent acquirer for value of information subject to a duty of confidence. This would mean that the innocent acquirer of information which has been unlawfully obtained, whether or not he has given value for it, would be in the same position as the innocent acquirer of information subject to a duty of confidence who has not given value for it¹⁹⁶. However, we recognise that this is a matter on which different views may be held and we would greatly appreciate comment.

PART VI

SUMMARY OF PROPOSALS FOR REFORM

147. We conclude with a summary of the provisional proposals made and questions raised in this Working Paper on which we would welcome views and comments:

General

- (1) There is a preliminary question as to whether the problems of the existing law

196. See para. 117 above.

should be left to be worked out by the courts through the cases, but in our view there is a need for legislation to clarify and reform the law (paras. 54-56).

Breach of Confidence

- (2) To provide a proper basis to the jurisdiction in breach of confidence cases, the action should be founded in tort and a new tort of breach of a statutory duty of confidence should be created (para. 59).
- (3) The new tort would replace the existing cause of action for breach of confidence which should accordingly be abolished (para. 60).
- (4) There is a need to distinguish the different situations which may give rise to an action for breach of the statutory duty of confidence and we suggest that the problem should be approached by taking into account the nature of the harm which a person to whom a duty of confidence is owed is liable to sustain and whether the information in question relates to him or not. On this basis, we suggest that there should be three categories of the new tort, namely:

Category I - The disclosure or use of information which would, in whole or in part, deprive the person to whom a duty of confidence is owed of the opportunity himself to obtain pecuniary advantage by the publication or use of such information.

Category II - The disclosure of information relating to the person to whom a duty of confidence is owed (the plaintiff) which the person subject to the duty (the defendant) knew, or ought to have known, would cause the plaintiff pecuniary loss and which in fact causes the plaintiff pecuniary loss.

Category III - The disclosure of information relating to the person to whom a duty of confidence is owed which would be likely to cause distress to a reasonable person in his position and which in fact causes him distress (paras. 61-65).

- (5) We raise the question whether it is necessary to provide for the circumstances covered by Category II of the new tort (para. 66).
- (6) There is a question whether the formulation of Category III of the new tort should be extended to cover annoyance or embarrassment which falls short of actual distress (para. 67).
- (7) We put forward three propositions to cover the circumstances in which the statutory duty of confidence should arise. The first two propositions would cover cases where information is received from or on behalf of another on the understanding that it would be treated in confidence and the third proposition would cover cases where a third party knows, or ought to know, that information has reached him through another who was subject to a duty of confidence in respect of it. Our first two propositions would refine the existing

law by making it an essential element of the duty of confidence that the person who received the information accepted, either expressly or by implication, an obligation to treat it confidentially (paras. 70-73).

(8) In accordance with our propositions regarding the circumstances giving rise to the statutory duty of confidence, the duty should be owed to the person by whom the information was given, to the person for whom it was obtained and, where there is a chain of transmission, to any person in the chain who has imposed a duty in respect of it. There is a question whether a breach of the statutory duty should be separately actionable at the suit of the person to whom the information relates but we doubt whether such a separate right of action can be justified in the context of the law of confidence (paras. 74-75).

(9) We raise the question whether the profitable exploitation of information at a time when the user neither knew nor ought to have known that it was the subject of a duty of confidence should give the injured party any right to claim restitution; but we doubt whether any remedy for innocent use in these circumstances can be justified (paras. 76-80).

(10) The statutory duty of confidence in respect of information should be a duty of refraining from using or disclosing information except to the extent that the disclosure or use is authorised by the person to whom the duty is owed and should include a duty to take reasonable care to ensure that unauthorised disclosure or use does not take place (paras. 81-82).

- (11) In relation to breaches of statutory duty falling within Category I of the new tort, it should be a defence that the information which is the subject of a duty of confidence was acquired for value in circumstances in which the acquirer neither knew nor ought to have known that it was subject to such a duty; but it should not be a defence that an innocent acquirer of information has subsequently changed his position (paras. 83-86).
- (12) There should be a defence of lawful authority to enable a defendant to be released from his duty of confidence in respect of information to the extent that he is under a legal duty to disclose it; but the defence should not be available where the duty of disclosure is purely contractual in nature (paras. 87-88).
- (13) There should be a defence of privilege corresponding to the defence of absolute privilege in defamation actions; but this defence should not be available in cases corresponding to those in which a defendant in a defamation action would have a defence of qualified privilege (paras. 89-90).
- (14) There should be a defence of public interest. It is for consideration whether any statutory guidelines should be laid down to determine the scope of the defence but we incline to the view that the defence should be kept as flexible as possible (paras. 91-93).
- (15) In relation to breaches of statutory duty falling within Category I of the new tort, it should be a defence to show that the information concerned was in the public domain; and information should

be treated as being in the public domain if the public have access to it by reason that it has been published generally (i.e. not in confidence to a restricted class of persons) or has been put on sale to the public or stored in a public archive. But where individual items of information have been applied or collected in a manner which requires the expenditure of a significant element of labour, skill or money, the resulting application or collection should not be treated as being in the public domain merely because the individual items from which it has been derived or of which it is composed are publicly available (paras. 95-97).

- (16) These principles should also apply where information which was originally secret has come into the public domain as a result of a breach of confidence. A person responsible for putting secret information into the public domain in breach of confidence should be liable in damages which take into account the fact that he has rendered the information unprotectable in the future but he should not thereafter be liable to be enjoined from using the information (paras. 98-101).
- (17) In relation to breaches of statutory duty falling within Category II or III of the new tort, we put forward an alternative approach to the problem of public domain. A complete defence would only be available in cases where a positive right of access to the information concerned is given by law; but the court would be required, in considering what relief, if any, should be granted to the plaintiff, to take

into account the extent to which the information which has been misused was generally known or was readily accessible to the public (paras. 102-105).

- (18) Where information has been acquired in the course of carrying out work for or on behalf of another, it should be a defence to an action for breach of duty falling within Category I of the new tort that the information can fairly be regarded as representing an addition to the personal skill, experience or ability of the acquirer (paras. 106-108).
- (19) To deal with the problems of misuse of an action for breach of duty falling within Category I of the new tort, particularly in relation to the protection of patentable information, it is for consideration whether there should be a defence that the information was not imparted in good faith; lack of good faith being established on proof that the sole or predominant motive of the plaintiff in imparting the information was to prevent the defendant from using it (paras. 109-112).
- (20) In determining whether to grant an interlocutory injunction to prevent a breach of the statutory duty, the court should have regard to the case as a whole, the practice in regard to interlocutory injunctions in libel cases being not necessarily appropriate (para. 114).
- (21) We raise the question of the principles on which the courts should award compensation in lieu of an injunction to prevent future breaches of the statutory duty; but as we envisage that these principles would in any event be followed

by the courts, we doubt whether there is any need to refer to them in the statute creating the new tort (paras. 115-118).

- (22) We suggest that it might be advantageous if the courts were given an express power to make an order (to be called a proprietary order) by virtue of which all or any of the plaintiff's rights in information could be transferred to the defendant on terms set out in the order (para. 119).
- (23) Damages for a breach of statutory duty falling within Category I or II of the new tort should be limited to the actual pecuniary loss suffered by the plaintiff; and in the case of a breach falling within Category III, should be awarded only for distress actually suffered by the plaintiff (paras. 120-121).
- (24) While it would be anomalous to authorise the award of exemplary (or punitive) damages generally for breach of the statutory duty, there is a question whether a plaintiff should be entitled to claim exemplary damages in the limited classes of case in which they are still obtainable by a plaintiff in other actions in tort; but we doubt whether there should be power to award exemplary damages in respect of the new tort in any circumstances (para. 122).
- (25) The remedy of an account of profits should continue to be available in respect of a breach of statutory duty falling within Category I of the new tort as an alternative to an award of damages, but we envisage that for practical reasons it would seldom be resorted to (para. 123).

- (26) It should continue to be possible for the court in a proper case to order the destruction or delivery up of material in which confidential information is recorded (para. 124).
- (27) It is for consideration whether a defendant who is unjustifiably threatened with proceedings for breach of the statutory duty should, at any rate where the information concerned is of a patentable nature, be entitled to obtain relief similar to that which is available under section 65 of the Patents Act 1949 to a person unjustifiably threatened with proceedings for infringement of a patent (paras. 125-126).
- (28) On the death of a party to an action for breach of statutory duty falling within Category I or II of the new tort, the action should survive against or for the benefit of his estate, as the case may be. But where the action concerns a breach within Category III (i.e. is for distress) the rule applicable to defamation should be followed, whether it is the present rule (under which the action would not survive) or a new rule which may be introduced following any recommendation in this respect by the Faulks Committee on Defamation (para. 127).
- (29) Where a person to whom the statutory duty of confidence is owed dies before a breach takes place, his personal representatives should have a limited right to continue to enforce the duty for the benefit of his estate (para. 128).
- (30) Actions for breach of the statutory duty should not be triable by a jury as of right, but the

court should have power to order a trial by jury in an appropriate case (para. 129).

- (31) County courts should have jurisdiction within their normal financial limits to try actions for breach of the statutory duty and their jurisdiction to grant injunctions to prevent a breach of the duty should extend to cases where no damage has yet been suffered (para. 130).

Disclosure or Other Use of Information
Unlawfully Obtained

- (32) There should be a new tort in respect of the disclosure or other use of information unlawfully obtained (para. 134).
- (33) For the purposes of this tort, information should be regarded as having been obtained unlawfully if it has been obtained by means of a criminal offence or if there has been a temporary taking without authority of any object from which the information was obtained, and perhaps also if it has been obtained by means of a trespass to land. We raise the question of whether, as an alternative, the concept of "information unlawfully obtained" should be defined in broad terms as being information obtained without the authority of the holder of it in circumstances in which the holder could reasonably have expected that it would not have been so obtained, having regard to the precautions which he had taken to protect it (paras. 135-140).

(34) Where there has been misuse of information obtained unlawfully, there should be a right to sue -

- (i) by the person from whom the information was unlawfully obtained;
- (ii) in the case of information unlawfully obtained from a person who had acquired it on behalf of another person, by that other person;
- (iii) in the case of information unlawfully obtained from a person to whom it had been entrusted in confidence by another person, by that other person.

We raise the question of whether a person to whom the information relates should have a separate right to sue (paras. 141-142).

- (35) An action in respect of the misuse of information unlawfully obtained should lie against any person who obtained the information by unlawful means and against any person who knows or ought to know that it was so obtained (para. 143).
- (36) The new tort should be divided into categories corresponding to the categories proposed for the tort of breach of confidence (para. 144).
- (37) In all other respects except one, the principles to apply to an action in respect of the misuse of information unlawfully obtained should follow those applicable to an action for breach of the statutory duty of confidence. The one exception is that there should be no defence corresponding to the defence to an action for breach of confidence that the information concerned was innocently acquired for value (paras. 145-146).

APPENDIX

CHAPTER 21 OF THE YOUNGER REPORT

CONFIDENTIAL INFORMATION AND INFORMATION UNLAWFULLY OBTAINED

629. In the course of this Report we have described a number of situations when the acquisition of information may involve a civil or a criminal wrong. Thus, the tort¹⁷⁴ of trespass may be committed by a person who enters a house without permission to eavesdrop on conversations, and if our recommendations in Chapter 19 are accepted it will become a crime in certain circumstances to use a technical device for the purpose of acquiring information. In this chapter, on the other hand, we are concerned with the legal restrictions which are, or in our view ought to be, imposed on the disclosure or other use of information.

630. Important restrictions on a person's freedom to disclose information in his possession are imposed by the law relating to breach of confidence. This branch of the law is discussed in greater detail in Appendix I. That survey of the present law has led us to two conclusions: first, that the action for breach of confidence affords, or at least is potentially capable of affording, much greater protection of privacy than is generally realised; secondly, that it would not be satisfactory simply to leave this branch of the law, with its many uncertainties, to await further development and clarification by the courts. We therefore recommend that the law relating to breach of confidence be referred to the Law Commissions with a view to its clarification and statement in legislative form.

631. We appreciate, however, that the resolution of uncertainties in the law necessarily involves decisions on the plane of policy regarding the broad aims of the law in question. As far as the protection of privacy is concerned, we think that the following broad aims of the law on breach of confidence would be generally accepted:

- (a) to provide remedies against the disclosure or other use of information (not already generally known) by persons in possession of that information under an obligation of confidence;

174. For the sake of convenience the terms we use in this Chapter are appropriate to English law. However, our observations apply equally to the corresponding concepts in Scottish law.

- (b) to make remedies available not only against a person who was entrusted by another with information in confidence but also against a third party to whom that person disclosed the information;
- (c) to protect the public interest in the disclosure of certain kinds of information, and the defendant's right of disclosure in certain privileged situations, by the provision of appropriate defences;
- (d) to afford remedies, whether by way of injunction, damages or claims for loss of profit which do justice to the reasonable claims of plaintiffs and defendants in differing situations.

632. There is another type of situation which, although it may be partially covered by the law relating to breach of confidence, raises problems which cannot be entirely solved by an application of that branch of the law, at least as it is generally understood. Although it is possible to steal a document which contains information, the information itself, not being either tangible or intangible property¹⁷⁵, is not capable of being stolen in terms of the Theft Act 1968. It follows that anyone who comes into possession of "stolen" information even with knowledge of its origin, is not guilty of a criminal offence if he discloses it or if he uses it for profit¹⁷⁶. We think that the damaging disclosure or other damaging use of information acquired by means of any unlawful act, with knowledge of how it was acquired, is an objectionable practice against which the law should afford protection. We recommend therefore that it should be a civil wrong, actionable

175. By "intangible property" the Theft Act 1968 is generally taken to mean matter such as gases (though the point has not apparently been tested).

176. Although there is little direct authority on the point, it is possible that the law regarding breach of confidence could be invoked to prevent disclosure of information by a person who knew that the document originally containing the information had been stolen, at least at the instance of the person from whom the document was stolen. See *Webb v. Rose* 1732, Skone James p. 41, and Gareth Jones 1970 86 *Law Quarterly Review*, p. 463 at p. 482. See also Appendix I paragraph 32 (iii).

at the suit of any person who has suffered damage thereby, to disclose or otherwise use information which the discloser knows, or in all the circumstances ought to have known, was obtained by illegal means. It would be necessary to provide defences to cover situations where the disclosure of the information was in the public interest or was made in privileged circumstances. We envisage that the kinds of remedy available for this civil wrong would be similar to those appropriate to an action for breach of confidence.

633. We would hope that, if the task of clarifying and stating in legislative form the law relating to breach of confidence is entrusted to the Law Commissions, they would also take into account and coordinate their work with the recommendation we have made in paragraph 632. The Scottish Law Commission would no doubt consider the situation from the point of view of Scottish practice and procedure.

